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Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

A. J. LIMB d/b/a LIMB REALTY

Plaintiff and Appellant,

— vs. —

FEDERATED MILK PRODUCERS ASSOCIATION, INC., FEDERATED DAIRY FARMS, INC., and KENNETH T. ALLRED,

Defendants and Respondents.

Case No 11543

BRIEF OF APPELLANT

Appeal from the Judgment of the Third District Court in and for Salt Lake County, Honorable D. Frank Wilkins, Judge.

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Salt Lake City, Utah

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Attorneys for Defendants and Respondents

FILED

APR 7 - 1969

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

A. J. LIMB d/b/a LIMB REALTY
Plaintiff and Appellant,

— vs. —

FEDERATED MILK PRODUCERS ASSOCIATION, INC., FEDERATED DAIRY FARMS, INC., and KENNETH T. ALLRED,
Defendants and Respondents.

Case No 11543

BRIEF OF APPELLANT

STATEMENT OF THE KIND OF CASE

Plaintiff brought this action to recover a real estate commission.

DISPOSITION IN LOWER COURT

The case was heard on mutual motions for summary judgment and from a judgment granting defendants' motion for summary judgment and denying plaintiff's motion for summary judgment plaintiff appeals.

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RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal of the judgment entered below and a judgment in his favor as a matter of law in the sum of $11,547.37 with interest at 6% per annum from April 24, 1966.

STATEMENT OF FACTS

During mid October, 1963, John Williamson, a real estate salesman employed by A. J. Limb d/b/a Limb Realty contacted Kenneth T. Allred, an employee of Federated Milk Producers Association in regard to listing the property known as 723 South State Street, Salt Lake City, Utah (Allred Dep. P. 2 L. 13-16; P. 3 L. 12-17.). After some preliminary discussion Kenneth T. Allred, on behalf of Federated Milk Producers Association, prepared, executed and delivered to Mr. Williamson the listing agreemen upon which this action is based. (Allred Dep. P. 5 L. 17-30; P. 6 L. 1-16; P. 8 L. 22-25) Mr. Allred was aware of the fact that Mr. Williamson was a real estate salesman for A. J. Limb d/b/a Limb Realty . (Allred Dep. P. 9 L. 10-21; P. 22 L. 26-28; P. 23 L. 1-2; P. 27 L. 24-26; P. 10 L. 29-30; P. 11 L. 1-4) The listing agreement was exclusive as to the clients indicated in the body of the agreement which included Sears. (Allred Dep. P. 10 L. 20-24; P. 16 L. 25-28) Pursuant to the terms of the listing agreement, Messrs. Limb and Williamson began to negotiate with the specified clients, including Sears, indicated in the body

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of the listing agreement. (Allred Dep. P. 10 L. 29-30; P. 11 L. 1-30; P. 12 L. 1-25; P. 10 L. 5-11; P. 13 L. 9-14; P. 16 L-3-7; P. 27 L. 24-26; Limb Dep. Pages 15-24; Williamson Dep. P. 19 L. 11-30; P. 20 L. 1-16; Pages 19-22)

In April, 1964, an abortive effort was made to terminate the listing agreement by sending a letter to Mr. Williamson. However, the letter was sent to the wrong John Williamson and was never received by the John Williamson who was employed by Limb Realty. (See the affidavits of Gayle Probst dated September 10, 1966 and John Williamson dated September 15, 1966). No attempt was made to communicate the termination of the listing agreement to A. J. Limb d/b/a Limb Realty. (Allred Dep. P. 19 L. 9-30; P. 20 L. 1) Mr. Kenneth T. Allred orally informed John Williamson that the listing agreement was to be rescinded, but this is disputed, and in any event, this recission was to be accomplished by the above-mentioned letter that was sent to the wrong John Williamson. (Allred Dep. P. 16 L. 25-30; P. 17 L. 1-9) Mr. Kenneth T. Allred received a copy of this letter and he knew that the John Williamson employed by Limb Realty lived on Texas Street. (Allred Dep. P. 19 L. 20-30; P. 20 L. 1; P. 20 L. 15-18)

In April of 1964, defendants listed the subject property for sale with another broker and a large "For Sale" sign was placed conspicuously on the property. The building on the property was later demolished. Messrs. Limb

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and Williamson thought they were still protected under their listing agreement as to the specific clients listed therein. (Limb Dep. P. 31 L. 1-2; P. 38 L. 1-2; P. 39 L. 1-7; Williamson Dep. P. 13 L. 17-24; P. 30 L. 28-30; P. 21 L. 1-2; P. 38 L. 22-24; P. 39 L. 23-30; P. 40 L. 1; P. 45 L. 18-32; P. 46 L. 1-30; P. 47 L. 1; P. 48 L. 1-30; P. 49 L. 17-25)

The subject property was sold to Sears in April, 1966 (Allred Dep. P. 27 L. 30; P. 28 L. 1-3) for $230,947.55 (Answer to Interrogatory No. 6 dated November 9, 1966)

The listing agreement upon which this action is based is printed in full below:

October 25, 1963

Mr. John Williamson
Salt Lake City, Utah
Dear Sir:

This is to authorize you to negotiate with clients for the purchase of 723 South State Street, Salt Lake City, Utah, those premises heretofore operated under the name of Cloverleaf Dairy. The terms are as follows:

1. The sale price and terms must be agreeable with us.

2. This authorization can be terminated by either party at any time, and will be automatically terminated should said property be sold to anyone.

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3. You are only authorized to negotiate with the following persons for the sale of said property:

Sears Co. Sid Horman

Huntington-Maxwell Hardware Co.

Bonneville on the Hill /s/ K.T.A.

Capital Chev. /s/ K.T.A.

Salt Lake Transfer /s/ K.T.A.

4. In the event that there is ultimately a contract of sale or sale entered into with any of the foregoing, then and in that event, we agree to pay you a sales commission of 5% of the selling price.

FEDERATED MILK PRODUCERS ASSOCIATION, INC.

By: /s/ Kenneth T. Allred

STATEMENT OF POINTS

POINT I

THE TRIAL COURT ERRED AS A MATTER OF LAW IN NOT GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT FOR THE COMMISSION EARNED BASED ON THE PROVISIONS OF THE LISTING AGREEMENT THAT WAS PREPARED BY DEFENDANTS.

POINT II

THE LISTING AGREEMENT AS PREPARED BY DEFENDANTS WAS NOT TERMINATED BY OPERATION OF LAW.

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POINT III

THE DOCTRINE OF EQUITABLE ESTOPPEL IS NOT APPLICABLE UNDER THE TERMS OF THE LISTING AGREEMENT PREPARED BY DEFENDANTS AND ON THE FACTS BEFORE THE COURT.

ARGUMENT

POINT I

THE TRIAL COURT ERRED AS A MATTER OF LAW IN NOT GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT FOR THE COMMISSION EARNED BASED ON THE PROVISIONS OF THE LISTING AGREEMENT THAT WAS PREPARED BY DEFENDANTS.

A broker's right to compensation must be governed exclusively by his contract of employment. This proposition is elementary and is stated in 12 *Am. Jur.* 2d Brokers, Section 182, p. 921:

> To entitle a broker to his compensation or commissions, he must accomplish what he undertook to do in his employment, for, as a rule, nothing short of that is sufficient to constitute a performance on his part . . . Accordingly, in every case reference must be had to the terms of that particular employment in order to determine whether or not a broker's duties have been performed, and it is clear that a broker who has performed all the services required under his contract of employment is entitled to his commission.

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As stated by this Court in *Porter* vs *Hunter*, ... Utah ....., 207 P 153 (1922) at 207 P 155:

> The burden of proof was upon plaintiff to establish that he had fulfilled the contract.

Other courts have dealt with brokers listing agreements and contracts similar to the one in the case at bar. The leading case of *Moore* vs *Holman Real Estate Co.*, 129 Ark. 425, 196 SW 479 (1917) points the way to a proper construction of the listing agreement before this Court. Plaintiff (broker) obtained a listing agreement from defendant (owner) for a period of three months. The listing agreement was apparently prepared by the plaintiff and contained the following provisions:

> And if the said property be sold or otherwise disposed of during the above period, no matter by whom, or after above period, on information secured through this agency, I agree to pay to said Holman Real Estate Company a commission of five per cent on the gross amount of the sale.

Plaintiff showed a prospective purchaser the property during the term of the listing but was unable to conclude a sale. After the listing had expired, the same prospective purchaser concluded the sale with defendant. At the trial a verdict was directed for plaintiff for the amount of his commission and on appeal this was affirmed. The Court used the following language in disposing of contentions similar to some of those in the instant case:

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> Appellant testified that he had acted in good faith, and had made no attempt to sell the property until after the expiration of the agency contract, and that he would not have sold the property to Gay had he known that appellee intended to claim or was entitled to a commission. Gay gave substantially the same testimony, stating, in effect, that the sale was brought about through the efforts of appellant after the expiration of the agency contract.

Appellant had requested certain jury instructions in the trial court and this was discussed by the Court as follows at 196 SW 480:

> In these instructions the jury was told that the contract fixed the time within which the sale was to be made, and that time was of the essence of the contract, and the broker was not entitled to his commission unless he produced a purchaser who was ready, willing and able to buy on terms and at a price agreed upon and within the three months. Another instruction told the jury there could be no recovery unless appellee was the procuring cause of the sale. Other instructions told the jury that, if a broker attempts, unsuccessfully, to effect a sale, and his proposed purchaser abandons the idea of buying, and the agent stops his negotiations, and the proposed purchaser is afterwards induced to buy by the principal, without in any way being influenced by the broker, the latter is not entitled to any commission.
>
> Appellant cites numerous cases announcing the law as stated. *But in none of them was there a contract containing a provision like the one set out*

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> *above.* Appellants brief elaborates the necessity of a finding that appellee was the procuring cause, and insists that the question should have been submitted to the jury. *Such, indeed, would be the law under the testimony of appellant but for the recitals of the contract set out above.*
>
> *This contract says nothing about procuring cause* . . . (Emphasis mine)

In *Clark* vs *Blackfoot Waterworks*, 39 Idaho 304, 228 P 326 (1924) the plaintiff (broker) was to be paid a commission by defendant (owner) if a sale was made within 12 months after the listing agreement expired to anyone with whom the plaintiff "shall have been in correspondence, or shall have opened negotiations" during the term of the listing. Plaintiff had approached the City of Blackfoot about purchasing the property and had met with the Mayor and City Council at a regular meeting. The City of Blackfoot had decided to "take no action at this time" although they purchased the property within the 12 months after the listing had expired. The Court said at 228 P 329:

> Under this provision of the contract, it was not necessary that the property be sold as a result of the efforts of the appellant. To recover, he was only required to prove that he *opened negotiations* or *had been in correspondence* with the city, to which the property was sold within the time provided in the agreement. (Emphasis Mine)

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In *McGuire* vs *Sinnett*, 158 Ore. 390 76 P2d 742 (1938) the contract provided plaintiff (broker) was to receive his commission if he should "place me (defendant) in touch with a buyer to or through whom, within ninety days after the expiration hereof, I may sell, exchange or convey said property." The Court held at 76 P2d 475:

> It was the plaintiff who placed the defendant in touch with the Bohmanns, within the meaning of the above-quoted provisions of the contract, and since the property was sold by the defendant to Bohmann under the conditions hereinbefore described, the *plaintiff became entitled to his commission regardless of whether he himself sold the property to Bohmann or whether he was the procuring cause of the sale.* (Emphasis Mine)

In *Engleman* vs *Auderer*, 10 La. App. 121, 121 So 194 (1929) plaintiff (broker) was to be paid a commission if a sale was made within ninety days after the expiration of the listing to anyone who the plaintiff had negotiations with during the term of the listing agreement. Plaintiff was not the procuring cause here and in fact had very little, if anything, to do with the sale that finally took place. The Court cited the following language used by the trial court with approval:

> The parties were capable of consenting, did consent and the object of the contract being lawful, it is perfectly good private law between the parties, and, however unwise, or, however foolish

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> a man may be to enter into such a contract, the courts do not sit to relieve men of their folly, but to enforce private as well as public laws.

The plaintiff (broker) brought an action against defendant (owner) based on the following provision in *Galbraith* vs *Johnson*, 92 Ariz. 77, 373 P2d 587 (1962):

> . . . if sold within one year after the expiration of this listing to anyone with whom you had negotiations prior to expiration.

In ruling for the plaintiff, the Court stated as follows:

> But patently a prospective seller may obligate himself by contract to the possibility of payment of an additional commission. . . . This Court has repeatedly ruled that parties have a legal right to make such contracts as they desire provided only that it is not for an illegal purpose or against public policy. A party can not complain of the harshness of the terms nor expect a court to relieve him or his consequences.

In *Clark* vs *Matheny*, 119 W. Va. 264, 193 SE 800 (1937) plaintiff (broker) brought an action for commission where the only thing plaintiff was obligated to do was to introduce prospects to the defendant (owner). The Court held as follows:

> Defendants main defense before the trial court was that plaintiff was not the procuring cause of the sale, and is therefore not legally entitled to

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> recover. Plaintiff responds that she did not propose to become the procuring cause of the sale or to aid in making the sale but did merely propose to introduce a prospect. . . . In the absence of a special contract, a broker claiming a commission on the sale of property must show that he sold it or was the procuring cause of the sale. . . . *But by special contract, he can engage to do much less, upon condition that he shall be compensated in case of sale. If he so engages, and he does what he agreed to do, and the sale is made, he is entitled to compensation.* (Emphasis Mine)

In *Winkler* vs *Cox*, ... Tex ....., 243 SW2d 248 (1951) the owner agreed to pay broker a commission "for services rendered." The Court said:

> Since the contract sued upon did not require Cox to procure a buyer, the issue of procuring cause never became an issue in the case.
> The issue in the case was whether Cox performed the contract made, and that contract was one that did not require him to procure a buyer.

In the case of *Crane* vs *McCormick*, 92 Cal. 176, 28 P 222 (1891) the Court held at 28 P 223:

> There is no merit to the contention of respondents that De Jarnatt & Crane cannot recover on the contract without showing that they had produced, or could have produced, a purchaser within the time fixed in the contract, and the cases cited are not in point. Defendants agreed for a valuable consideration to pay the commission if

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> a sale should be effected in any way during the year. . . . A real estate agent's right of recovery depends entirely upon his contract with the owner of land. . . . According to the express terms of the contract, this entitled them, upon proof of performance on their part, to the same commissions they would have earned if they had sold the land for the amount realized by the owners.

To the same effect see *Dobinson* vs *McDonald*, 92 Cal 33, 27 P 1098 (1891); *Leonard* vs *Fallas*, 51 Cal 2d 649, 335 P2d 665 (1959); *Maze* vs *Feuchtwanger*, 106 Wash 327, 179 P 850 (1919); *Delbon* vs *Brazel*, 134 CA2d 461, 285 P2d 710 (1955); *Leatherman* vs *Freeman*, ..., 266 P2d 473 (1954).

The Utah Supreme Court has recognized the difference between a general listing agreement and a special listing agreement. In the case of *Watson* vs *Odell*, 58 Utah 276, 198 P 772 (1922) the Court stated as follows:

> The line of demarcation between the principles applying to the rights of a broker under a special contract and to his rights under a general employment is clear and distinct. As stated in *Karr* vs *Moffatt*, 105 Kan. 692, 185 P 890: "The ordinary rule that a real estate agent is entitled to his commission when he procures a purchaser who is ready, willing and able to buy, or when he brings a buyer and seller together who make a bargain on different terms than those theretofore dictated by the agent, does not apply when the agent's commission is governed by a special contract between him and his principal."

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Defendants rely on the case of *Flinders* vs *Hunter*, 60 Utah 314, 208 P 526 (1922) on the issue of no consideration in that the plaintiff herein was not the procuring cause of the sale. In the *Flinders* case the contract provided in part as follows:

> For and in consideration of $1.00, the receipt of which is hereby acknowledged, I hereby appoint Fred Flinders Company exclusive agent to make sale of the property above described for the price and upon the terms above stated, or a less price, or different terms, agreed upon by the owner of the property. . . . If a customer furnished by them within said terms buys said property within said term, or at any time thereafter, I agree that they shall have and may retain from the proceeds arising from such sale 5 percent commission on sale price. . . .

Under the terms of this agreement the broker clearly must be the procuring cause of the sale. Based upon this assumption, there could not be any consideration as the broker had not fulfilled the terms of the contract. The issue of consideration in these listing agreements is resolved by the inquiry; did the broker fulfill the terms of the contract? If the broker did what he was engaged to do under the terms of the contract, then there is the requisite consideration necessary to support a simple contract. The *Flinders* case is usually cited for the proposition that the owner had properly terminated the authority of the agent prior to the sale and this Court

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so held. The language used referring to the issues of procuring cause and consideration is unsound both on reason and authority.

The case of *Frederick May & Co., vs. Dunn,* 13 Utah 2d 40, 368 P2d 266 (1962) casts some doubt on the language used in the *Flinders* case. In the *May* case the Court said:

> It is generally recognized that a brokers authority to sell property is not exclusive and does not require the payment of the commission to the broker upon a sale not produced by him, *unless made so by the contract of employment in clear unequivocal terms* or by necessary implication. This brokerage contract is what is called a general listing agreement which leaves the owner free to sell the property himself as long as he does so in good faith. Under such contracts a broker must be the procuring cause in order to be entitled to a commission for such a sale. . . . *However, the extent to which the brokers efforts must induce the sale depends on the terms used in the contract* and the understanding and intentions of the parties in making such agreement and the facts and circumstances of the case. . . . (Emphasis Mine)

In *Curtis* vs *Mortensen,* 1 U2d 354, 267 P2d 237 (1954) the broker was engaged to find a buyer who was ready, willing and able to buy the property listed by the owner. The broker produced a qualified buyer and the owner refused to complete the sale. This Court ruled for the broker and stated as follows:

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> "Under such circumstances they have fulfilled their part of the listing agreement by having produced purchasers who were ready, willing and able to buy the listed property and are entitled to their commission. Such were the terms of the listing agreement made by the parties. There was no requirement that a binding contract be entered into and for us to add that requirement would be to make a new contract for them. This we may not do."

The clear import of this language is that there can be a recovery of a commission by a broker where he is not the procuring cause as long as the contract does not require this and he otherwise fulfills the terms of his contract. In such a case, there is obviously consideration for the owner's promise to pay a commission.

The rule is stated in 12 *Am. Jur.*, 2d, Brokers, Section 189, p. 930:

> *In the absence of a special agreement,* a broker must be the procuring cause of a sale or a transaction in order to be entitled to commission thereon. (Emphasis Mine)

Under the express and unambiguous terms of the listing agreement prepared by defendants upon which this action is based, plaintiff need only show (1) that he negotiated with the clients indicated on the listing agreement and (2) that a sale was ultimately made to one of these clients.

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The word negotiate is defined in *Webster's International Dictionary,* 2nd Edition (1934) as follows:

> 1. To transact business. 2. To hold intercourse or to treat with a view to coming to terms upon some matter, as a purchase or sale. . . .

The evidence of negotiation with Sears and other clients on the listing agreement is overwhelming and undisputed. Please see the depositions of Messrs. Allred, Limb and Williamson and the specific references thereto in the Statement of Facts. Likewise, there is no question that defendants made a sale of subject property to Sears for the sum of $230,947.55.

Plaintiff concedes that this listing agreement as prepared by defendants is improvident and will require defendants to pay a second commission. However, they are the victims of their own poor draftsmanship and should be held to the terms of this instrument.

In the case of *Real Estate Exchange* vs *Kingston,* 18 Utah 2d 254, 420 P2d 117 (1966) the broker agreed to take his commission out of payments made by the buyers. Upon default by the buyers, broker brought an action for the balance of the commission. In holding for the defendant (owner) the Court said:

> That may have been a foolish agreement, but foolish or unfoolish, it was made, nonetheless.

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In *Smith* vs *Burton*, 4 U2d 61, 286 P2d 806 (1955), plaintiff (broker) attempted to collect a real estate commission based on an agreement he prepared. This Court ruled against the broker and said:

> "This agreement, *prepared by plaintiff*, is construable most strongly against him."

Even if it were necessary in this case that plaintiff be the procuring cause of the sale, plaintiff introduced the property to Sears Co. See affidavit of Sheldon Chris Johnson dated March 7, 1967. This Court said in *Frederick May & Co.* vs *Dunn*, *supra*:

> Usually, whether the broker first approaches, or brings to the attention of the buyer that the property is for sale, or brings the buyer into the picture, has considerable weight in determining whether the buyer (broker?) is the procuring cause of the sale.

Accordingly, plaintiff is entitled to judgment against the defendants in the sum of $11,547.37 with interest as a matter of law.

POINT II

THE LISTING AGREEMENT AS PREPARED BY DEFENDANTS WAS NOT TERMINATED BY OPERATION OF LAW.

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Defendants contend that the listing agreement does not provide for any expiration nor for any period of time that it will remain valid and therefore, plaintiff only had a reasonable time to conclude sale with Sears.

The agreement provides that if there is "ultimately" a sale to Sears the defendants will pay a commission to plaintiff. The word ultimately is defined in *Webster's International Dictionary*, 2nd Edition (1934) as follows:

Finally; at last; in the end.

The defendants use of this word in listing agreement can have only one meaning when you consider that this was an exclusive agency agreement as to the clients listed therein. If there was ever a sale to Sears, regardless of time, the commission would be payable. This is the clear meaning of the language used by defendants and they should not be heard to complain at this date. See *Real Estate Exchange* vs *Kingston*, *supra*, and *Smith* vs *Burton*, *supra*.

The most that can be said for this agreement insofar as the time for performance is concerned is that its meaning is not clear or that it is ambiguous. This Court held in *Olsen* vs *Kidman*, 120 Utah 443, 235 P2d 510 (1951) that:

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> The listing agreement was prepared by defendant, and if it was ambiguous, it should be construed against him.

These same principles must necessarily apply when the seller or owner of land prepares the listing agreement.

The listing agreement before the Court is a permanent listing as to the clients listed therein subject only to the right of the defendants to terminate the agreement which was not done.

The lapse of time between the negotiations by plaintiff and the sale to Sears cannot properly be considered by this Court.

POINT III

THE DOCTRINE OF EQUITABLE ESTOPPEL IS NOT APPLICABLE UNDER THE TERMS OF THE LISTING AGREEMENT PREPARED BY DEFENDANTS AND ON THE FACTS BEFORE THE COURT.

The basis for the application of the doctrine of equitable estoppel are the facts that another broker's "For Sale" sign went up on the subject property and the building on the property was demolished prior to the time the sale to Sears was made. Defendants also insist that plain-

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tiff had a duty to inform defendants that he had a listing agreement with them on the subject property whereby he was to be paid a commission if a sale was made to any of the five clients listed therein.

The text authorities and cases cited by the defendants are not in point. The law cited generally deals with a situation where the party to be estopped had knowledge or facts that were not known to the injured party, and that the party to be estopped had a duty to disclose these facts. In the case at bar, the defendants already knew the material facts they feel plaintiff should have disclosed. Under these circumstances, the plaintiff could have no duty to disclose what the defendants already knew.

In *Tripp* vs *Bagley*, 74 Utah 57, 276 P 912 (1929) the Supreme Court said at 74 Utah 72:

> One of the essential elements which must enter into and form a part of an equitable estoppel is that the truth concerning the facts relied upon by the person claiming the estoppel was unknown. A person may not avail himself of the conduct, acts, language, or silence of another under the doctrine of equitable estoppel unless such person has been misled thereby.

The defendants obviously knew they had an agreement with plaintiff and in fact made an effort to terminate it. Their failure to terminate this agreement properly was due to their negligence or the negligence of their

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agents in sending the termination letter to the wrong John Williamson. Mr. Kenneth T. Allred received a copy of the termination letter sent to the wrong John Williamson and he knew or in the exercise of reasonable care should have known that the letter had been mis-sent. Plaintiff had absolutely no knowledge that an effort had been made to terminate the listing agreement.

In 28 *Am. Jur.*, 2d, Estoppel & Waiver, Section 80, p. 721, the law in these situations is stated as follows:

> One who claims the benefit of an estoppel on the grounds that he has been misled by the representations of another must not have been misled through his own want of reasonable care and circumspection. A lack of diligence by a party claiming an estoppel is generally fatal.

Plaintiff fails to see any disclosure of fact he could have made that was not already within their knowledge, and accordingly, the doctrine of equitable estoppel is not available to defendants in this case. Defendants say that they would not have closed the deal with Sears if they knew Limb was going to claim a commission. This contention was made in the case of *Moore* vs *Holman Real Estate Co., supra*, and the Court in that case did not even bother to discuss this contention as it is completely without merit.

The testimony of Messrs. Limb and Williamson on the issue of estoppel as raised by defendants is uncontradicted and decisive:

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Q. Wallace-McConaughy? You did see a sign on the property listing it for sale?

A. Yes.

* * *

A. Yes, sir, and I felt as far as Sears was concerned we had no problem. (Limb Dep. P. 30 L. 10-12; P. 31 L. 1-2)

Q. Did you have a conversation with Mr. Williamson relating to a conversation he had with Mr. Allred concerning the proposition, if there ever was a sale to Sears that Limb would get a commission?

A. We had always felt that if the property was sold to Sears that we would be entitled to a commission because of the last paragraph.

Q. Is that the last paragraph in this agreement?

A. Yes.

* * *

A. Yes, Mr. Williamson always felt and always tried to convey to me that as far as Sears and Mr. Allred and Cloverleaf, we would be entitled. (Limb Dep. P. 38 L. 10-23)

A. * * * Somebody had mentioned the property had been listed but I felt that it really didn't matter in terms of our own ability, our own rights on it because we had Sears and Roebuck and the other companies that we had contacted protected by our listing agreement which they had originated. (Williamson Dep. P. 30 L. 28-30; P. 31 L. 1-2)

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Q. Did you have any reason to believe at the time that you saw the sign on the building that Wallace-McConaughy was not to receive a commission?

A. I didn't think they would receive a commission if it was sold to Sears and Roebuck because I felt if they did they would have to pay two commissions. (Williamson Dep. P. 38 L. 19-24)

Q. Did you and he have any conversation about whether you would get your commission or not if somebody else sold the property pursuant to the fact that it was listed?

A. Yes, we have discussed this numerous times. We felt that due to the original listing agreement which was initiated by Cloverleaf Dairy which is now I guess Federated Milk, that we would be protected in any case irregardless of any other listing on the property insofar as Sears and Roebuck was concerned. (Williamson Dep. P. 39 L. 23-30; P. 40 L. 1)

Q. Did he indicate that you would be protected in the event of a sale to Sears and Roebuck?

A. Yes, he did.

Q. * * * did you feel it necessary to contact Mr. Allred concerning this?

A. No, I thought we were always protected from any of Sears Roebuck and any of the others and that Mr. Allred had initialed all these companies and I didn't feel it was necessary at this time.

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Q. Did you feel it was necessary to contact Sears and Roebuck?

A. Well, I didn't feel it was necessary to do this. (Williamson Dep. P. 46 L. 18-30; P. 47 L. 1)

Q. Well, did Mr. Allred indicate that you were protected if you sold the property?

A. Well, that was the purpose of the listing I think, that the intent on the original listing was to protect me that way. I don't think that there was an excessive amount of conversation on protection you know involving these different meetings that we had.

Q. Was there ever any conversation to the effect that you were protected if somebody else sold the property?

A. Yes, there was and this is like I said on the initial one that if somebody else — that we would be protected in terms of the commission in case somebody else did sell the property. Now as to the exact wording of that or the exact conversation I can't recall it word for word. (Williamson Dep. P. 48 L. 11-24)

The "For Sale" sign erected by the second broker was a general offering for sale and did not specifically make overtures to Sears or the other clients on the listing agreement. Plaintiff could only conclude that the second broker was hired under a general listing contract that would invite and all who might see this sign to inquire concerning the purchase of this property. It was also reasonable

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for plaintiff to conclude that he was protected insofar as Sears was concerned based on the listing agreement. At the time plaintiff and Williamson saw the "For Sale" sign and later, the building being demolished, they could not by any stretch of the imagination guess that a sale would be made to Sears. Accordingly, plaintiff had no duty to make inquiry of defendants, Sears, the second broker, or anyone else based on the protection contained in the listing agreement.

The inferences drawn by the defendants are somewhat strained and there is no evidence to support some of these inferences. The following is one example:

> . . . and yet during all that period of time they remained silent, laying back, expecting that they then could raise a claim for a commission that they in fact had not earned. (Defendants Brief in lower court, p. 15)

It is submitted that under the facts of this case the plaintiff is not estopped from recovering the commission he is entitled to under the terms of the listing agreement prepared by defendants.

CONCLUSION

Plaintiff is entitled to judgment for his commission as a matter of law based on the listing agreement prepared by defendants.

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Respectfully submitted,

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