

1975

Cleo R. Powell v. Dick E. Bastian, Dee V. Sharp, Sharp Realty, Provo Branch Prudential Federal Savings and Loan Association: Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

EO R. POWELL,

Appellant,

vs.

CK E. BASTIAN, DEE V.
ARP, dba SHARP REALTY
d PROVO BRANCH PRUDENTIAL
DERAL SAVINGS & LOAN
OCIATION, a Federally
rtered Savings and Loan
ociation,

Respondents.

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Case no.
04 FEB 1976 13939

BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

BRIEF OF RESPONDENT
Dee V. Sharp

Appeal from a Judgment of Fourth Judicial District
Court, Utah County, following a trial to the
Court, Honorable J. Robert Bullock, Judge

FILED
MAY 7 1975

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

CLEO R. POWELL, *

Appellant, *

vs.

DICK E. BASTIAN; DEE *
V. SHARP, dba SHARP *
REALTY and PROVO
BRANCH PRUDENTIAL
FEDERAL SAVINGS and *
LOAN ASSOCIATION, a
Federally Chartered
Savings and Loan *
Association, *

Case no.

13939

Respondents. *

BRIEF OF RESPONDENT

Dee V. Sharp

Nature of the Case

This is an action for damages in connection with the sale of a house by the appellant to the defendant Bastian with an option to repurchase. It is basically a dispute as to the disposition of the proceeds of the second sale of the same house to a third party named Ethington. This respondent was involved

only in a correlary issue as to whether the appellant was liable for fees to the realtor who located the second purchaser.

DISPOSITION OF THE CASE
IN THE LOWER COURT

The matter was tried in the District Court without a jury, and on the issue involving this Respondent, the Court found that there was a fiduciary relationship between the realtor and the Seller of the property, but that that relationship did not require the realtor to adjudicate a dispute between the appellant and the respondent Bastian, who was the first purchaser of the house.

FACTS OF THE CASE

In June of 1970, the Appellant owned a home in Orem, Utah, which was encumbered by a first mortgage at Walker Bank and Trust Company, a second mortgage at Lockhart Company, in addition to which

there was a judgment in favor of Provo Adjustment Service and a warrant for delinquent taxes in favor of the State Tax Commission,

The holder of the second mortgage threatened to foreclose because of delinquent installments owned by the appellant, and in order to avoid this calamity, the Plaintiff approached the Respondent Bastian and ultimately sold him the property for the \$16,000.00. taking back an option to repurchase within three months for \$18,000.00, plus interest. She deeded the property to Bastian who paid off the second mortgage and assumed the first mortgage; Bastian also paid off the judgment and the tax lien and paid to Appellant the balance of \$3,055.34.

After attempting unsuccessfully to sell the home privately, the appellant listed the property for sale

with Boley Realty Company who registered it on the Multiple Listing Service in Utah County.

Respondent Sharp, a broker who is also connected with the Multiple Listing Service, located a buyer named Ethington and he prepared on behalf of the Ethingtons an earnest money offer which he presented to Mrs. Powell. After accepting the offer and signing the earnest money agreement, Mrs. Powell informed Sharp that she had sold the property to Bastian and that Sharp would have to obtain Bastian's signature on the earnest money; she did not disclose the fact that she had an option to repurchase the property.

Mr. Sharp arranged for Ethingtons to finance the purchase of their new home through Prudential Federal Savings and Loan and attended the loan closing with his clients, the Ethingtons.

Mr. Sharp approved the closing statements insofar as they applied to the Ethingtons, he was not aware of any dispute between Mrs. Powell and Mr. Bastian until some months later when Mrs. Powell took out bankruptcy and Sharp received a series of letters from an attorney acting on behalf of Mrs. Powell. (See Stewart-Sharp letters, Exhibits "A", "B", and "C".)

The appellant's argument Points I, II, IV, V and VI, are addressed to the other respondents and no attempt will be made hereto respond to those points. The respondent Sharp will respond only to Point III of the appellant's brief.

POINT I

A REAL ESTATE BROKER IS
ONLY REQUIRED TO ACT IN
GOOD FAITH AND NOT AS A
GUARANTOR.

The appellant in her brief
relies almost wholly on the case of

Reese vs. Harper, 8 Utah 2(d) 119, 329 P, 2(d) 410, in attempting to argue that the broker somehow violated his fiduciary duty to the appellant. On page 15 of the Appellant's brief, it is stated:

"Mrs. Powell alleged in her verified complaint and the trial court found as fact (R-104) that defendant Sharp was employed by Mrs. Powell as her agent and the court found Sharp owed her a fiduciary duty. This finding places this aspect to this case on all fours with Reese vs. Harper..."

The actual finding of the Court was distinctly to the contrary. The Court's memorandum decision, Judge Bullock found in paragraph 2;

"2. Defendant Dee V. Sharp as a real estate broker, had a duty to the seller to whom he charged a commission to apply his abilities and knowledge to the advantage of the seller and make full disclosure to the seller, etc. as set forth in Reese vs. Harper, 8 Utah 2(d) 119; notwithstanding the fact that the

sales agency contract was with another real estate agent. However, this obligation pertains to the interests of the seller, as opposed to the interests of the buyer and except as to good faith requirements, it does not require the agent who has found a buyer for the property to represent one seller as against another seller, especially where there is nothing, as in this case, to put him on notice, that there is any conflict of interest between them. There is no evidence that Dee V. Sharp acted without entire good faith."

The case before the Court is easily distinguishable from the Reese vs. Harper case. In Reese vs. Harper, the broker had, in fact, listed the Seller's property for the sum of \$45,000.00, he then located a buyer who offered to pay \$30,000.00 for the property. There were outstanding mortgages and other obligations against the property amounting to approximately \$15,000.00 and the seller of the property assumed that the new buyer was

assuming the obligations outstanding against the property and that they would net \$30,000.00. In fact they would net only approximately half that much because the sale to the purchaser did not include an assumption of the outstanding obligations, but anticipated the payment of all outstanding obligations out of the purchase price of \$30,000.00. The court quite rightly held in the Reese vs. Harper case that the broker had failed to disclose the true facts to his client and therefore forfeited any right he had to recover his broker's fees.

In the instant case the opposite is true, it is Mrs. Powell, who failed to disclose all of the facts known by her to the realtor. She alone knew the full facts of the transaction between her and Mr. Bastian and at no time did she ever disclose those facts to Mr. Sharp.

She simply told him that the property had been sold and in order for the second sale to take place to the Ethingtons, Mr. Sharp would have to get the earnest money assignment signed by Bastian. In actual practice it is not at all unusual for the owner of the fee to sell on an unrecorded contract under which another person is the equitable owner,

On page 16 of appellant's brief, appellant refers to three separate grounds for her contention that Mr. Sharp failed to perform his duties, to-wit:

(a). by failing to notify her of the time and place of the closing. (b). by failure to examine and approve the closing statement and (c) by permitting unlawful charges against Mrs. Powell's equity.

The trial court found on the facts, that Mrs. Powell had not disclosed to Mr. Sharp any reason to be concerned

on her behalf, he had simply located a buyer ready and willing and able to purchase the property and he assumed that according to custom that Prudential Federal Savings and Loan, the loaning institution would conduct the closing meeting to be held in their offices and that his only responsibility would be to see that the accounts balanced as between Ethingtons and the seller or sellers.

The trial court correctly found that it is beyond the scope of Reese vs. Harper to require the Realtor to act as a mediator between two sellers. The court also correctly found:

"there is not evidence that defendant Sharp acted without entire good faith."

In the case of Bunnell vs. Bills, 13 Utah 2(d) 83, 368 P. 2(d) 599, at page 600, our court distinguished between that case and the Reese vs. Harper

case on the grounds that in the Bunnell case that was doubt as to the validity of the contention that the realtor was acting as the Plaintiff's agent, when in fact he was agent for the other party. There can be no doubt that there is a different fiduciary duty and a more demanding one in a situation like Reese vs. Harper, than in the instant case, there was full disclosure of all the information that the realtor had to the seller.

POINT II

THE TRIAL COURT FOUND ON THE FACTS THAT UNDER THE CIRCUMSTANCES, MR. SHARP HAD DISCHARGED HIS DUTY TO MRS. POWELL "WITH REASONABLE DILIGENCE,"

The Reese vs. Harper case also been referred to by our Supreme Court in the case of Raspbury vs. Bainum, 15 Utah 2(d) 62, 387 P. 2(d) 240, the court in restating the Reese vs. Harper, doctrine

refers to duty flowing from the fact that one party is in a peculiar position to be familiar with the fiduciary affairs of the other. It is evident from the record that no such relationship existed between Mrs. Powell and Mr. Sharp. Mr. Sharp was in fact, a representative of the Ethingtons, who were the ultimate purchasers of the property. He simply presented an earnest money offer to Mrs. Powell, who told him in terms he reasonably interpreted as disclaiming any further financial interest in the contract, that she had sold the property to Mr. Bastian and Mr. Sharp would have to look to the Bastians for a further signature, in order to effectuate the sale of the property to the Ethingtons. No communication was made to Mr. Sharp that would in any way place him on notice that there was a dispute between Powell and Bastian.

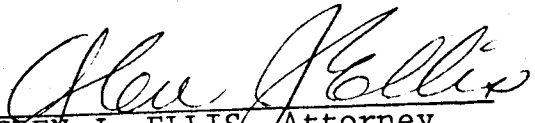
It is likewise it not unusual for a prior owner such as Mrs. Powell to still have a financial interest in the property when it is resold, so the fact that Bastian was shown as seller and that Mrs. Powell had a distribution from the closing would impose no duty on Mr. Sharp to protect her rights, when no such rights were made known to him.

The appellant herein has elected not to rely on the trial transcript. In effect, this is then an appeal on the law only and the facts as found by the lower court should be accepted on appeal in the light most favorable to the Respondent.

The lower court found Mr. Sharp to have performed his function in good faith, if Mrs. Powell has any complaint, it is that Bastian owes her some money. If that is true, then she has a


full and complete remedy available at law and no stringent equitable remedy is applicable,

Respectfully submitted this
9th day of May, 1975.


GLEN J. ELLIS, Attorney
for Respondent-Sharp

Mailing Certificate

Mailed a copy of the foregoing Brief of Respondent to, Justin C. Stewart, Attorney for appellant, at 425 Newhouse Building, Salt Lake City, Utah 84111, and Dallas H. Young, Jr., attorney for Bastian, 48 North University, Provo, Utah, and S. Rex Lewis, attorney for Respondent-Prudential Federal Savings and Loan Association, 120 East 300 North, Provo, Utah, postage prepaid this 8th day of May, 1975, at Provo, Utah.



Attorney