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The Boyer Company, a Utah corporation and H. Roger Boyer dba The Boyer Compnay v. L. Keith Lignell and Burton M. Todd : Brief of Respondent

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

IN THE SUPREME COURT OF THE STATE OF UTAH

THE BOYER COMPANY, a Utah corporation and H. ROGER BOYER dba THE BOYER COMPANY,

Plaintiffs and Appellants,

vs.

Case No. 14442

E. KEITH LIGNELL and BURTON M. TODD,

Defendants and Respondents.

BRIEF OF DEFENDANTS-RESPONDENTS

Appeal from the Third Judicial District Court
of Salt Lake County, State of Utah
The Honorable Stewart M. Hanson, Sr., Judge

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STATEMENT OF CASE

The plaintiffs brought suit to recover from defendants a commission for broker's services rendered by them under a listing agreement and an earnest money receipt and offer to purchase.

DISPOSITION IN THE LOWER COURT

A judgment of no cause of action and a dismissal with prejudice was entered by the Trial Court against both plaintiffs.

RELIEF SOUGHT ON APPEAL

The defendants ask the Court to affirm the judgment of the Trial Court.

STATEMENT OF FACTS

The respondents disagree, in part, with the facts as set forth by appellants. In addition, appellants have omitted many salient facts relied upon by the Trial Court and necessary for this Court to understand fully the elements of this case. Plaintiffs view the important facts as follows:

On August 18, 1972, the individual plaintiff, H. Roger Boyer ("Boyer") applied for an individual real estate broker's license with the Department of Business Regulation, Real Estate Division. That license was issued on December 14, 1972, and during all times relevant thereafter H. Roger Boyer held, as an individual, a valid Utah Real Estate Broker's License (Finding No. 3, R. 194, Exhibit 8-P). The Boyer Company, a Utah Corporation, was incorporated on November 8, 1972 (Finding No. 1, R. 193). It neither applied for nor held a Real Estate Broker's License at any time relevant to this suit (Finding No. 2, R. 193). In the latter part of September, 1973, Boyer received a telephone call from Mr. Douglas Callister ("Callister"), his cousin, who was also the attorney for the Osmond Brothers, a singing group. Mr. Callister solicited the help of Boyer in locating property in Utah that would make a suitable investment for the Osmond Brothers.

Pursuant to this request, Boyer called Burton M. Todd ("Todd") shortly thereafter and inquired whether or not Todd would be willing to sell the Shaughnessey Apartments, a small apartment building located in Salt Lake City, Utah, owned by him and E. Keith Lignell ("Lignell"). Todd answered in the affirmative, that they might be willing to make a sale upon the fulfillment of certain terms and conditions.

During all times relevant to this matter Boyer was the agent for the Osmond Brothers and was acting for and on their behalf in the proposed purchase (Finding No. 3, R. 94, T. 138, Callister Depo. pp. 44-45). The Osmonds were, at this time, also looking at other properties with Mr. Boyer (T. 146, Callister Depo. p. 44). Mr. Lew Costley ("Costley"), the Osmond Brothers' accountant, and Callister met in Salt Lake City with Boyer to discuss the Shaughnessey Apartments and other potential real property investments on behalf of the Osmonds. One item discussed was the defendants' need for money and its impact on the price the Osmonds would offer. Boyer indicated that he understood that the defendants' were in need of money. At that time, Boyer apparently did not have a listing on the property but felt that he could obtain one from the defendants (Callister Depo. pp. 8-10).

Thereafter, Boyer procured from Todd a listing agreement authorizing him to procure a sale of the Shaughnessey Apartments for the sum of $915,000.00 (T. 14-15, Exhibit 1-P). The listing agreement set forth the following conditions:

1. That a condition precedent to the payment of any commission to H. Roger Boyer was the consummation of the transaction or the closing of the sale of the apartments and the actual receipt of the proceeds therefrom by the defendants (Exhibit 1-P, Finding No. 4, R. 194).

2. Any sale of the property was subject to the approval of Northwestern Mutual Life Insurance Company ("Northwestern") the holder of the permanent mortgage (Exhibit 1-P.)[1]

3. The dental building adjacent to the apartments, also owned by defendants, was specifically excluded from any sale (Exhibit 1-P, Finding No. 4, R. 194).

On October 11, 1973, the corporate plaintiff, The Boyer Company, prepared and presented to defendants for their acceptance an Earnest Money Receipt and Offer to Purchase wherein the Osmond Brothers, a Utah Partnership, purported to offer to purchase the subject apartments for the sum of $921,500.00. By its terms the said proposal was conditioned upon the buyers being able to assume, and assuming, the $512,000.00 mortgage bearing interest at seven percent[2] then outstanding with Northwestern and sellers agreeing to lease-back the property for three years. (Finding No. 7, R. 194).

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[1]Approval of Northwestern was vital to sellers because the mortgage contained a "call" clause and absent approval, sellers would be obligated to pay a penalty of $35,000 (T. 84, MacLeod Depo. pp. 14, 15, 28).

[2]The prevailing interest rate at that time was around 10% (T. 33, 215, MacLeod Depo. p. 23).

The document provided that any offer expired if not accepted in writing within one day, (Finding No. 7, R. 194), and that any sale should close on or before October 18, 1973 (Exhibit 1-P). In addition, the document contained the following provision:

> "It is understood and agreed that the terms written in this receipt constitute the entire preliminary contract between the purchaser and the seller, and that no verbal statement made by anyone relative to this transaction shall be construed to be a part of this transaction unless incorporated in writing herein." (Exhibit 1-P).

Two other provisions of the Earnest Money Agreement are significant. It provided that any agreement to pay a commission was of no force or effect if there existed a presently effective listing agreement with any other agent (Finding No. 15, R. 196), and that if the offer was not accepted the return of the earnest money would cancel the offer without damage to the agent (The Boyer Company) (Finding No. 7, R. 195).

The Earnest Money Receipt and Offer to Purchase was delivered to Todd and Lignell by Boyer on October 11, 1973. Upon receipt of the document defendants determined that certain provisions contained therein were unacceptable to them; however, because defendant Todd was going out of town the next day, he executed the document and placed his initials in the lower right hand corner above line 53 in anticipation of certain modifications that would be placed there by defendant Lignell (Finding No. 8, R. 195). On October 12, 1973, Lignell deleted lines 22, 23 and 24 of the said Earnest Money Receipt

and Offer to Purchase relating to the lease-back of property by the sellers, initialed the deletion, signed the document and delivered the same to plaintiff corporation. The corporate plaintiff then mailed the document to the Osmond Brothers in care of Costley at Ogden, Utah, where it was received on or about October 15, 1973. (Finding No. 9, R. 195). Thereafter, Boyer telephoned Callister and advised him of the changes to the Earnest Money Agreement made by Todd and Lignell.

Upon receipt of the document, Costley placed it in his desk drawer; he did not sign it or do anything to indicate his acceptance thereof on behalf of the Osmonds (T. 136). The acts of the defendants constituted a counter-offer, which counter-offer was never accepted by the proposed buyers, the Osmond Brothers. (Finding No. 11, R. 195). The defendants did not accept the Earnest Money Receipt and Offer to Purchase and the offer expired by its own terms and ceased to have any legal force or effect (Finding No. 10, R. 195).

Within a week to ten days after Costley received the amended document he telephoned Callister and discussed it with him. (T. 119). In that conversation the two decided that the Osmond Brothers would agree to enter into the Earnest Money Agreement as modified (T. 118-121). On October 15, 1973, Boyer telephoned Todd, advised Todd that the deletion could be worked out and requested that Todd telephone the insurance company (T. 21, Boyer Depo. p. 43, T. 83). That evening, Todd telephoned Theodore C. MacLeod ("MacLeod"), the Regional Manager of Northwestern at his home in Boulder,

Colorado, informed him of the proposed transaction, told him about the Osmonds and inquired concerning the possibility of having the Osmonds assume the existing mortgage at the 7% rate. Todd again called MacLeod at his office on October 17th and 18th concerning the proposed transaction (T. 81). Todd was told by MacLeod that Northwestern would not permit the Osmonds to assume the loan absent an increase in the interest rate or some other modification (T. 27, 38, 157). Subsequent thereto, Todd had further telephone conversations with MacLeod throughout the month of October and into the month of November concerning the transaction (T. 81). Todd informed Boyer that the insurance company had refused his request to allow the Osmond Brothers to assume the loan at the 7% rate (T. 50).[3]

On October 26, 1973, Todd, Lignell, Boyer and Earl D. Tanner met for lunch and discussed, in the framework of MacLeod's refusal, a method by which the assumption of the Northwestern loan could be arranged. During that conversation, Boyer requested that he be allowed to talk directly with Northwestern, which permission was granted by the defendants (T. 209).

On October 30, 1973, Boyer met with Costley and Callister to discuss incentives that they might offer to Northwestern in order to induce them to allow the Osmond Brothers to assume the mortgage. Some of the incentives discussed were the prepayment of interest and a slight increase in the interest

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[3]Boyer, however, denied that Todd had ever told him the assumption had been refused but did acknowledge that he had that impression (T. 209).

rate.[4] Although discussions were had, no specifics were agreed upon concerning what the Osmonds would or would not do in order to induce Northwestern to allow them to assume the loan (T. 138).[5]

On November 2, 1973, Boyer telephoned MacLeod to determine the status of the proposed assumption. MacLeod told Boyer to have Todd give him a call (MacLeod Depo. p. 8). Boyer then telephoned Todd and asked Todd to write MacLeod a letter and send a copy to Boyer (T. 50). Since Todd had already made a number of telephone calls to MacLeod, he interpreted Boyer's request to be an indication that Boyer did not believe that he had talked extensively with MacLeod; nevertheless, he agreed to write the letter (T. 50).

On November 11, 1973, Boyer telephoned MacLeod to determine whether MacLeod had received a phone call or a letter from Todd (T. 216). MacLeod told Boyer to contact Todd and discuss that matter with him.

On November 16, 1973, five days after his telephone conversation with MacLeod, Boyer called Todd and inquired whether or not the defendants were going to sell. Todd interpreted this to be an ultimatum requiring a yes or no answer

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[4]While Boyer indicated that the Osmonds would consent to a 2% rate increase (Boyer Depo. p. 46), Callister had in mind nothing more than a 1/4 to 1/2 percent rate increase (Callister Depo. p. 25).

[5]Boyer testified that at that meeting a prepayment of interest was considered and that they discussed what the Osmonds might be willing to do and under what conditions they might waive their right to insist on the 7% assumption (T. 213).

and faced with that ultimatum, stated that the defendants were not prepared to go forward at that time, whereupon Boyer requested that he be sent a letter setting forth that fact (T. 29, 163). Todd agreed to do so, prepared the letter on November 19, 1973, and sent it to Boyer (Exhibit 5-P). Thereafter, on November 26, 1973, Boyer returned to Costley the $5,000 that had been deposited with him by the Osmonds. (Exhibits 14-D, 17-D).

ARGUMENT

Point 1

THE COURT WAS CORRECT IN ITS ADOPTION OF THE FINDINGS OF FACT AND CONCLUSIONS OF LAW. SUCH FINDINGS ARE ENTITLED TO GREAT WEIGHT.

On the 29th of September, 1975, the Court rendered its Memorandum Decision, wherein it determined that the claims of plaintiffs should be dismissed with prejudice. Further, the Court requested that defendants' counsel prepare the necessary Findings of Fact and Conclusions of Law (R. 187-188). This defendants did and submitted them to the Court for its review along with a copy to plaintiffs' counsel (R. 199). The proposed Findings of Fact were signed by the Court on the 28th day of October, 1975. Within the ten day period provided in Rule 52(b), U.R.C.P., plaintiffs filed a "Motion Objecting To and To Amend Findings of Fact and Conclusions of Law", wherein most of the issues raised in this appeal were presented to the Court (R. 200-211). Specifically, plaintiffs sought to attack

Finding No. 6, that defendants had exercised good faith, and Finding No. 17, that they were free to terminate the listing agreement -- the same findings attacked herein. In their place plaintiffs proposed, among other things, a finding that defendants had exercised bad faith in their dealings with plaintiffs (R. 203, Proposed Finding 13(g)). Those proposed amendments were rejected by the Trial Court after careful deliberation and hearing argument of counsel. Having failed in a direct attack upon the Findings and Conclusions of the Court, plaintiffs now seek to attack them indirectly by arguing that these Findings and Conclusions should not be entitled to the presumption of validity that is generally accorded to findings and conclusions of the court. See Hardy v. Hendrickson, 27 Ut.2d 251,492P.2d 28 (1972); Lynch v. McDonald, 12 Ut.2d 427, 367 P.2d 464 (1962).

The preparation of the proposed findings and conclusions by defendants is in accord with the long established custom of the Court. In reviewing this practice this Court stated in Merrill v. Bailey & Sons Co., 99 Ut. 323, 106 P.2d 255 (1940):

> "The duty of making findings and conclusions is that of the trial court. In doing so it has become customary to have the prevailing party submit proposed findings and conclusions, and by rule of court the adverse party may submit objections and proposed amendments thereto--all of which was done in this case."

The practice attacked by plaintiffs is not unique to this state but has been done with approval in many other jurisdictions (See, e.g., Jefferson v. City of Anchorage, 513 P.2d

1099 (Alaska, 1973); Wyoming Farm Bureau Mut. Ins. Co. v. May, 434 P.2d 507 (Wyo. 1967).

As in the Merrill case, plaintiffs submitted objections and proposed amendments to the Findings and Conclusions entered by the Court. After deliberation and argument the proposed findings of plaintiff were rejected and the proposed findings and conclusions prepared by defendants were reaffirmed. Thus, the Trial Court twice deliberated over the Findings and Conclusions that are being here attacked by appellant, thereby, in respondents' view, not diminishing therefrom as plaintiffs suggest, but rather enhancing the weight that should be given to them.

Plaintiffs attack certain of the findings upon the proposition that they are not specifically mentioned in the Court's Memorandum Decision. The Court, however, clearly stated that its Memorandum Decision was not intended to be exhaustive nor to specifically detail each and every fact upon which it based its decision. The Court therein stated:

> "There are many more reasons the court could state for reaching the conclusions as set forth, including reference to the many cases cited by respective counsel." (R. 187).

It is clear that there is no conflict between the Memorandum Decision prepared by the Court and the Findings and Conclusions ultimately entered by it. Even if there had been a conflict, however, under the law of this state, the formal findings must prevail. Park v. Jamieson, 12 Ut.2d 141, 364 P.2d 1 (1961).

It is the well established rule of this state that findings of fact and conclusions of law as entered by the trial court are granted a presumption of validity and unless clearly erroneous should not be overturned. Martin v. Martin, 29 Ut.2d 413, 510 P.2d 1102 (1973). Such presumption must attach to the Findings and Conclusions entered in this case.

Point II

THE BOYER COMPANY WAS NOT LICENSED AS A REAL ESTATE BROKER AS REQUIRED BY THE LAWS OF THIS STATE.

Section 61-2-1, U.C.A. provides:

> "It shall be unlawful for any person, co-partnership, or corporation to engage in the business, act in the capacity of, advertise, or assume to act as a real estate broker or a real estate salesman within this state without first obtaining a license under the provisions of this chapter." (Emphasis added)

An unlicensed broker is precluded by statute from maintaining an action to recover compensation for any act done or service rendered for which a license is required. Section 61-2-18, U.C.A. states:

> "No person, partnership, association, or corporation shall bring or maintain an action in any court in this state for the recovery of commission, a fee, or compensation for any act done or service rendered, the doing or rendering of which is prohibited under the provisions of this act to other than licensed real estate brokers, unless such person was duly licensed hereunder as a real estate broker at the time of such act or the rendering of such service." (Emphasis added)

Both the plaintiffs and defendants agree that if The Boyer Company was not licensed as a real estate broker during

the time in question, the corporation cannot recover herein.[6] This is in conformity with the law of this state relating to compensation for unlicensed activities. See Chase v. Morgan, 9 Ut.2d 125, 339 P.2d 1019 (1959); Mosley v. Johnson, 22 Ut.2d 348, 453 P.2d 149 (1969); Lyman v. Taylor, 14 Ut.2d 362, 384 P.2d 407 (1963); Eklund v. Elwell, 116 Ut. 521, 221 P.2d 849 (1949); Olson v. Reese, 114 Ut. 411, 200 P.2d 733 (1948); Smith v. American Packing & Provision Co., 102 Ut. 351, 130 P.2d 951 (1942).

Plaintiffs herein attempt to fuzz the distinction between H. Roger Boyer, an individual, and The Boyer Company, a corporation. Since a corporation is a separate legal entity, however, that distinction must be kept clearly in mind. 1 Fletcher Cyc. Corp. (Perm. Ed.) 7, p. 37; 16-14-4, U.C.A. The undisputed facts clearly show that H. Roger Boyer, an individual, applied for an individual broker's license on August 18, 1972 (Exhibit 8-P). The application form set forth three categories of licenses that might be obtained -- corporation, partnership or individual. Boyer, in his own handwriting, applied for an individual license (T. 219, Exhibit 8-P). The subject license application further requested disclosure of the name and address of each member or officer if the applicant was a corporation; that portion of the license application was left blank by Boyer. In addition, different affidavits were called for depending on whether the

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[6]Plaintiffs, on page 16 of their brief, state "It is undisputed that unless The Boyer Company was licensed as a real estate broker during October and November, 1973, The Boyer Company cannot maintain this action."

applicant was a partnership, an individual or a corporation. Boyer filled out the individual affidavit, but left the corporation affidavit blank. The testimony is uncontroverted that the license issued to Boyer was an individual broker's license (T. 220, 222, 277-279).[7]

Subsequent to the date the license application was submitted by Boyer but prior to the time the license was issued, The Boyer Company was incorporated.[8] Subsequent to that date, the individual license of Boyer was renewed by him on January 1, 1973 (T. 222, 278). On December 19, 1973, one month after the proposed sale had been terminated, the Department of Business Regulation, Real Estate Division, received an application prepared by Boyer for the renewal of a real estate broker's license wherein, for the first time, The Boyer Company was designated as a corporation and H. Roger Boyer was designated as an official of that corporation (T. 279, Exhibit 8-P). Thus, it is evident that Boyer appreciated the distinction between The Boyer Company, a corporation, and himself as an individual, and knew that it was necessary to notify the Department of Business Regulation that it was the corporation that was now seeking to obtain a broker's license. In fact, Boyer testified that he was an employee of the

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[7]Counsel for plaintiffs also recognized that the license as issued was an individual license to Mr. Boyer; as Mr. Rooker stated, "Now if I understand you then the broker license in this instance was issued to Mr. Boyer personally." (T. 268).

[8]The Boyer Company was incorporated on November 8, 1972, some two and a half months after the licensing application was prepared.

corporation from which he merely drew a salary and that any real estate commissions that were earned were commissions earned by the corporation (T. 223).

Although the testimony of Mr. Francis is confusing at best, he apparently was of the opinion that his department made no distinction between an individual and a corporation for licensing purposes. Mr. Francis testified, however, that he had only been the Department Director for a year and a half and had no idea whether his predecessor distinguished between individuals and corporations (T. 285). The documents produced, however, indicated that the Department did make a distinction in that it required different information and different procedures if the applicant were an individual or a corporation. Further evidence indicated that corporate applications were filled out differently than was the application of Boyer, and that the licenses issued to corporations contained different wording (Exhibits 8-P, 23-D and 24-D). Defendants submit that the evidence indicates that the Department clearly distinguished between licenses issued to individuals and corporations, and had done so for a number of years.

Plaintiffs seek to avoid the clear requirement of the law by taking refuge in what plaintiffs claim is a valid interpretation of the law by an administrative agency. Defendants submit that the testimony of Mr. Francis not to the contrary, the Real Estate Board clearly distinguished between individuals and corporations. Mr. Francis testified, however, that even he was not sure of his interpretation and

that he was concerned about it in view of the language of the statutes (T. 273, 272, 269).

Even assuming that the interpretation of the statute by the Department was such as plaintiffs' urge, plaintiffs can take no refuge therein. The clear law of the State of Utah is to the effect that administrative interpretations are not controlling and are not binding upon the Courts, although such interpretations will be given some weight when not out of harmony with the apparent intent of the statute. Kennecott Copper Corp. v. Anderson, 30 Ut.2d 102, 514 P.2d 217 (1973); State v. Hatch, 9 Ut.2d 288, 342 P.2d 1103 (1959). Even the Coleman case, upon which plaintiffs rely, recognizes that an administrative interpretation is of value only when uncertainty exists as to the interpretation of the statute and there is a rational basis for it in the provisions of the law. Even if these two tests are met, however, the administrative interpretation is not controlling. Coleman v. Utah State Land Board, 17 Ut.2d 14, 403 P.2d 781 (1965).

In that portion of its Memorandum Decision relating to the licensing statute, the Court stated:

> "However, the law is clear and unequivocal. And the court is of the opinion that the corporation is barred from recovering." (R. 187).

Defendants submit, as the Court found, that the law on this matter is clear and unequivocal. The Legislature specifically provided that corporations must have a real estate broker's license and that if they fail to do so they may not maintain a suit for recovery of compensation based thereon.

That the Legislature contemplated issuing broker's licenses to corporations is further indicated by other provisions of the applicable statutes. Section 61-2-2, U.C.A. includes within the definition of broker "all persons, partnerships, associations and corporations, foreign and domestic," who for a fee sell, rent, exchange, etc. real property. Section 61-2-9(c), U.C.A. provides that:

> "Each real estate broker's license granted to any firm, partnership or association consisting of one or more persons, or to a corporation, shall entitle such real estate broker to designate one of its officers or members, who upon compliance with the terms of this chapter shall, without the payment of any further fee, upon issuance of said broker's license, be entitled to perform all of the acts of a real estate salesman contemplated by this chapter." (Emphasis added)

As set forth in the above provision, any firm, partnership or association consisting of one or more persons, or a corporation, to whom a valid broker's license had been issued, can designate an individual within that firm, partnership, association or corporation, to function as a real estate salesman without the necessity of paying an additional fee. Of particular note is the limiting feature of the statute that provides that such privilege is only afforded to organizations consisting of more than one person, or to corporations, it being for the obvious reason that an individual broker would be able to perform the functions of both a broker and a salesman. The statute, therefore, places the corporate broker on an equal basis with the individual broker in that it can both broker and sell property upon the payment of the same fee as is required of an individual.

If any doubt remained that the Legislature made a clear distinction between individuals and corporations for licensing purposes, that doubt is dispelled by the clear wording of the penalty provisions for a violation of the licensing requirements.

Section 61-2-17, U.C.A. provides:

> "Any person violating a provision of this act, in addition to being subject to suspension or revocation of license, shall, upon conviction of a first violation thereof, if a person, be punished by a fine of not less than $100.00, nor more than $500.00, nor by imprisonment for a term not to exceed ninety days, or both; and if a corporation, be punished by a fine of not more than $1,000.00. Upon conviction of a second or subsequent violation, if a person, shall be punished by a fine of not less than $500.00, nor more than $1,000.00, or by imprisonment for a term not to exceed two years, or both; and if a corporation, be punished by a fine of not less than $2,000.00, nor more than $5,000.00. Any officer or agent of a corporation or any member or agent of a partnership or association, who shall personally participate in or be accessory to any violation of this act by such corporation, partnership or association, shall be subject to the penalties herein prescribed for individuals." (Emphasis added)

It is interesting to note that the above statute provides that upon any violation by a person, such person is liable for a fine or imprisonment or both. If, however, the violation is by a corporation, said corporation is subject only to a fine. The corporate fine is, in all cases, greater than the fine provided for a violation by an individual. The Legislature clearly recognized that it would be impossible to imprison a corporation but not an individual, hence, the individual is subject to a fine and imprisonment while the

corporation is only subject to a large fine.

It is also particularly interesting to note that any officer or agent of a corporation who participates in or is an accessory to the violation of the act is subject to the penalties provided for individuals, i.e., fine and imprisonment.

Section 61-2-21, U.C.A. deals with the mechanics for revoking a previously issued license. That section by its specific language relates to persons, partnerships, or corporations, yet another clear indication that the licensing requirements were intended to apply to corporations.

Plaintiffs base their entire argument upon the proposition that Section 61-2-6(a) requires the applicant for a broker's license to pass an examination, provide references, etc., and that thus it is impossible for a corporation to be an applicant. Defendants submit, however, that the testing of the corporation can be accomplished as provided in Section 61-2-9(c), i.e., an official may be designated to represent the corporation in that testing capacity.[9]

In view of the clear language of the statute, and the clear pronouncement of the Legislature that a corporation requires a broker's license, the administrative interpretation advocated by plaintiffs must fail as having no rational basis

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[9]Defendants submit that in many areas including contracting, engineering and architecture, it has logn been the practice of licensing agencies to issue licenses to corporations engaged in those areas. See Section 58-23-10, U.C.A.

in the law.

Defendants' further submit that, notwithstanding the contentions of plaintiffs, and the interpretation of the statutes urged by them, plaintiff corporation still cannot recover. As cited by plaintiffs, Mr. Francis testified that following the Division's approval of the association between a licensed individual and a brokerage corporation, both the corporation, in its name, and the associated individual may properly act as brokers (T. 279-82, 299). The evidence is clear that the corporation, The Boyer Company, did not apply for a license or request the approval of the Division until December 19, 1973, a month after the transaction had been terminated (Exhibit 8-P). Boyer testified that the corporation did not separately apply for a license until December of 1973 (T. 222). Mr. Francis testified that the first time his Department had anything to do with The Boyer Company, a corporation, was beginning January 1, 1974 (T. 279). Thus, even had plaintiff corporation thereafter become a licensed broker, a position that defendants feel is not supported by the clear law of this state, it could not have been licensed at the time the act or service was rendered; therefore, plaintiffs' claim of "substantial compliance" must fail. If the corporation was not licensed at the time the act or service was rendered, it is prohibited from maintaining an action in any court for the recovery of commission pursuant to the terms of §61-2-18, U.C.A. Even if it subsequently became licensed, the corporation's purported "substantial compliance" one month

after the transition was terminated, fails to satisfy the statutory requirement.

Even had it been properly licensed, the corporation still cannot recover as will be discussed later since its sole claim for commission is based upon the Earnest Money Receipt and Offer to Purchase, a document which was never accepted by the defendants and which, by its own terms, lapsed one day after it was proffered (Finding No. 10, R. 195).

Point III

THE TRIAL COURT'S FINDINGS ARE SUPPORTED BY AMPLE EVIDENCE AND MUST BE SUSTAINED.

On appeal, the evidence must be viewed in a light most favorable to sustain the lower court. The findings are presumed to be valid and correct and will not be disturbed unless they are clearly contrary to the evidence, and the appellant must sustain the burden of showing error. Hardy v. Hendrickson, 27 Ut.2d 251, 495 P.2d 28 (1972); Carlton v. Hackett, 11 Ut.2d 389, 360 P.2d 176 (1961). Defendants submit that the findings of the Trial Court are adequately supported by the evidence and must be sustained by this Court on appeal. Defendants acknowledge that there were some areas where the testimony was in dispute, but a mere conflict of testimony is not sufficient to overturn the Court's findings. As this Court has stated:

> "The resolution of the dispute in this case is governed by that old and oft-repeated rule that where the evidence is in conflict, it is the trial court's prerogative to believe that

> which it finds more convincing, and that its findings will not be disturbed on appeal so long as there is some substantial evidence to support them." McCarren v. Merrill, 15 Ut.2d 179, 389 P.2d 732 (1964).

Defendants submit that at best plaintiffs' arguments show no more than a conflict in the testimony, in which case the Trial Court's findings should not be disturbed.[10] There is, in the record, competent testimony supporting all of the Court's factual findings. The Trial Court made its findings, which were adverse to the plaintiffs, after hearing testimony from the parties, which testimony was at various times in dispute. The findings were reviewed again by the Trial Court upon plaintiffs' motion and were again reaffirmed by it (R. 215). This Court has frequently indicated that where competent evidence supports the factfinder's conclusions, it cannot substitute its judgment for that of the Trial Court, even if it disagrees with its findings. Pitcher v. Lorensen, 18 Ut.2d 368, 423 P.2d 491 (1967).

A. Defendants acted in good faith in their dealings with plaintiffs and made reasonable efforts to consummate the sale.

On October 15, 1973, Todd's first day back in the office after he had been out of town, Boyer telephoned him

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[10] An action for breach of contract is an action at law, rather than equity. Flynn v. Shocker Const. Co., 23 Ut.2d 140, 459 P.2d 433 (1969). In an action of law, the appellate court does not reverse on issues of fact where the trial court's findings are supported by the evidence or the absence of it. Martin v. Martin, 29 Ut.2d 413, 510 P.2d 1102 (1973).

and indicated to Todd that he (Todd) was to call MacLeod concerning the assumption of the mortgage by the Osmond Brothers and further indicated to Todd that the matter of the deletion could be worked out (T. 21, 83, Boyer Depo. p. 43). Boyer testified that he told Todd that the contract was acceptable to the Osmonds as amended. This fact was denied by Todd and, on disputed evidence, the Court concluded that the counter-offer was never accepted (R. 187). Costley testified that he first became aware of the deletion of the lease-back provision when he received an amended copy of the Earnest Money Receipt and Offer to Purchase in the mail, which document was received by him on October 15, 1973 (T. 118, Finding No. 9, R. 195). Costley further testified that he telephoned Callister to discuss the deletion of the lease-back provision with him within a week to ten days thereafter (T. 119). Plaintiff states, in its brief[11] that "in that conversation the two decided that the Osmond Brothers would agree to enter into the Earnest Money Agreement as modified." Costley thereafter phoned Boyer and told him that the deletion was acceptable (T. 121). Thus, there is evidence from plaintiffs' own witness that the decision to go ahead was not even made until at least a week after plaintiffs' purported conversation. Defendants submit that there is ample evidence to corroborate the testimony of Dr. Todd concerning that disputed conversation. Be that as it may, Dr. Todd immediately telephoned

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[11]Appellant's brief, page 6.

Mr. MacLeod at his home in Boulder, Colorado, to discuss the transaction with him (T. 27, 81, Exhibit 8-P). Thereafter Todd telephoned MacLeod on the 17th and 18th of October and again on the 25th, 26th and 29th of that month. Todd testified that MacLeod told him unequivocally that Northwestern would not allow the Osmonds to assume the mortgage at the 7% rate (T. 27, 38, 157).[12] Todd then requested that MacLeod indicate to him what the insurance company would be willing to do. MacLeod indicated he would get with his board of directors and let Todd know, but he never did so (T. 28, 47-48). Todd felt, based upon his prior dealings with MacLeod that MacLeod's response was final and left no room for negotiation and that any further offers or proposals would have to come from MacLeod (T. 31, 38-39). Todd thereafter conveyed the refusal of MacLeod to Boyer (T. 50).

During his conversations with MacLeod, MacLeod indicated that he did not know who the Osmonds were, so Todd told him about them. Todd indicated that the Osmonds were substantial people, were good people to deal with and otherwise placed them in a most favorable light (T. 48, MacLeod Depo. pp. 26, 59, 60, 66). At no time did Todd tell MacLeod not to deal with the Osmonds or with their representative Boyer (MacLeod Depo. p. 46); in fact, Todd told MacLeod that they were allowing Boyer to call him directly (T. 28, 76). Thus,

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[12]Although MacLeod did not recall making that statement he testified that such a refusal would have been "quite possible if not probable" (MacLeod Depo. pp. 44-45) and part of his negotiating posture on behalf of Northwestern (MacLeod Depo. pp. 47, 59).

the conduct of Todd was hardly that of one attempting to block the sale as plaintiffs urge; rather, at all times his actions were to the contrary.

On the 26th of October, Todd and Lignell, at their own expense, met with Boyer and also invited their attorney, Earl D. Tanner, to discuss the problems presented by MacLeod's refusal to allow the assumption and discuss alternative ways to accomplish their goal. At that meeting, Boyer requested permission to telephone MacLeod directly, which permission was freely granted by defendants (T. 209). Approximately four days after the meeting at the Ft. Douglas Club, Boyer participated in meetings with Costley and Callister, discussing incentives that they would be willing to offer in order to induce Northwestern to allow the assumption of the mortgage by the Osmonds. Although many of these possible inducements were spelled out to Boyer, they were only communicated by him to Todd in a general way and Todd was not privy to the details thereof or to the determination as to which, if any, of the incentives the Osmond Brothers would actually be willing to give (T. 238). Thus, Todd can hardly be criticized for failing to convey information he never received and upon which the proposed buyer's agents had not even agreed.

The sole basis upon which plaintiffs predicate their contention that defendants exercised bad faith is the failure of Todd to write a letter, as requested by Boyer on the 2nd of November. Todd indicated he felt the request from Boyer was questioning his integrity and the representations that had

been made by him concerning his telephone calls to MacLeod and the discussions concerning the proposed transaction. Boyer indicated that he asked Todd to make a formal request. Todd denied that fact and inidicated that Boyer had merely asked him to write a letter (T. 50).

It is interesting to note that MacLeod, in his deposition, indicated that in his first conversation with Boyer, he requested that Boyer have Todd give him a call (MacLeod Depo. p. 5). MacLeod did not at anytime tell Todd that a formal application from him relating to the proposed transaction was required (T. 253, MacLeod Depo. p. 47), nor did he tell Todd that he would not deal with the Osmonds without his (Todd's) okay (MacLeod Depo. p. 60). In fact, on an earlier occasion MacLeod freely dealt with outside parties without defendants' prior knowledge and without their consent (T. 253, Exhibits 6-P and 7-P). It is, therefore, pure conjecture on the part of plaintiffs that Todd exercised bad faith in failing to write the letter, and such conjecture is directly contrary to the specific Finding No. 6 of the Trial Court (R. 194).

Plaintiffs proposed deleting Finding No. 6 and substituting therefore their Finding No. 13(g) which provided that defendants had exercised bad faith in the transaction, the position they are urging on this appeal. That proposition was rejected by the Trial Court.

The actions of Todd in failing to write the letter have to be further viewed in light of the fact that he felt

he did not have a deal with the Osmonds (T. 156). The Court agreed and held that the counter-offer had not been accepted by plaintiffs (Finding No. 11, R. 195). There was, therefore, no requirement that Todd do more to complete the transaction. Defendants were free to terminate the listing agreement at any time. The listing agreement entered into between defendants and H. Roger Boyer, the individual plaintiff, did not give him an exclusive listing of the property, contained no termination date, and provided that the commission would be paid only upon the consummation of the sale. Boyer testified that all of his listing agreements were done by letter or other document similar to that executed by defendants, and that he did not use the standard listing agreement of the Salt Lake Real Estate Board (T. 217). Since Boyer was not given an exclusive listing for a set period of time, he cannot complain.[13] He was entitled to a commission only if a sale were actually consummated. No sale was consummated and defendants did not prevent the plaintiff from performing his duties. Defendants were free to terminate their relationship with Boyer at any time. The termination was done fairly and in good faith by defendants on the 19th day of October, 1973, at the request of the individual plaintiff, H. Roger Boyer (Finding No. 17, R. 196). See Wicks v. Moyle, 103 Ut. 554, 137 P.2d 342 (1943).

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[13]Boyer apparently reviewed the listing letter and found it to be acceptable to him (T. 63-65).

Plaintiffs attempt to inject two red herrings into their appeal -- taxes and financing of other property. Plaintiffs repeatedly assert that defendants' actions were motivated by tax considerations. Todd indicated that while he was concerned about the recapture potential, as anyone would be, his analysis showed that there would be no problem. In spite of repeated questioning by plaintiffs' counsel attempting to prove otherwise, Todd steadfastly maintained that this was not one of the reasons the transaction was terminated (T. 160). Further, Todd testified that he could have taken a $200,000 tax gain without incurring any taxes because of his accumulated loss carry-overs (T. 163, 164). The contentions to the contrary now being put forth by plaintiffs are wholly without merit.

Plaintiffs, on what is at best disputed testimony, seek to have this Court believe that defendants financed other parcels of property thereby obviating the necessity of selling the subject building. While Boyer produced some notes of conversations with Todd purporting to estabalish that fact, Todd denied that such statements were ever made and further testified, without contradiction, that the alleged transactions would have been impossible (T. 247-259).[14]

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[14]Todd testified that at the time they were not even owners of the fee on one parcel and that on the other the lending documents precluded a sale.

B. Prospective Buyers Were Not Ready, Willing and Able.

Plaintiffs contend that, in spite of the fact that the listing agreement was a special listing agreement providing that the commission would be earned only upon the consummation of the sale, and that even though no sale was consummated, they are, nevertheless, entitled to receipt of a commission. In so doing, plaintiffs again attempt to blur the distinction between the individual plaintiff, H. Roger Boyer, and the corporation, The Boyer Company. The evidence was clear, and the Court found, that the claim of the individual plaintiff, H. Roger Boyer, could be sustained only upon the listing agreement (R. 186, Finding Nos. 4 and 5, R. 194). That agreement provided that before any commission was paid the sale must be consummated. It is undisputed that no sale was consummated.

Plaintiff Boyer testified that he did not assign any of his rights in the listing agreement to the corporation and that all of the efforts relating to the Earnest Money Agreement were done by the corporation (T. 223-224, Boyer Depo. pp. 59-60, Finding No. 16, R. 196).

The corporation's sole entitlement to a commission is based upon the language in the Earnest Money Receipt and Offer to Purchase, wherein a commission in the sum of $28,500.00 is recited to The Boyer Company. Since, however, that Earnest Money Receipt and Offer to Purchase was not accepted by sellers, that entire document, including any apparent

agreement to pay a broker's commission, must fail. In addition, since there existed a listing agreement with another broker at that time, any agreement to pay a commission was, by the terms of the Earnest Money Agreement, "of no force or effect" (Exhibit 1-P, Finding No. 15, R. 196). Further, by the terms of the document, a return of the earnest money cancelled the offer (Finding No. 7, R. 195). The money was returned on November 26, 1973 (Finding No. 14, R. 196).

Plaintiffs seek, nevertheless, entitlement to a broker's commission based upon the claim that the purchasers were "ready, willing and able," a term that has great significance in a general listing agreement, but which has no significance in this case in view of the special restrictions in the subject listing agreement. It is significant to note that plaintiffs proposed a finding to that effect but that it was refused by the Trial Court (T. 202).

Regarding the ability of the Osmonds to assume the loan at 7%, Mr. MacLeod testified that it was the company policy to have Northwestern "participate" in the re-sale of the property where the interest rate is a factor (MacLeod Depo. pp.20-23, 52) and that any sale to the Osmonds would require adhering to the policy of improvement for Northwestern (MacLeod Depo. p. 27).[15] MacLeod further testified that Northwestern could not consider approving the sale to the

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[15]In a previous assumption involving defendants, Northwestern had required the new borrower to pay a higher interest rate (MacLeod Depo. pp. 20-21).

Osmonds except on conditions consistent with its policy of effecting some improvement for itself (MacLeod Depo. p. 28).[16] MacLeod acknowledged that he had no authority to guarantee that the company would have approved the assumption had he requested it. His authority was not to approve, but just to recommend (MacLeod Depo. p. 40). In fact, MacLeod acknowledged that he could not even state that he would have recommended the assumption without additional financial and other information (MacLeod Depo. p. 63), but stated that there was no guarantee that he would have recommended the assumption even if pressed. (MacLeod Depo. p. 70). Even had MacLeod recommended it to the home office, there is, of course, no assurrance that that recommendation would have been accepted.

C. The Offer Was Impossible To Perform.

Plaintiffs attempt to persuade this Court to ignore a major impediment to the consummation of the sale, to wit: the separation of the mortgage and property between the apartment complex and the dental building.[17] There is no dispute that the listing agreement specifically indicated to plaintiff Boyer that the dental building was separate and apart from the transaction and would not be sold but, rather, had to be

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[16]MacLeod did state that he would have recommended the assumption had the requests persisted, however, it would have been a recommendation with great reluctance (MacLeod Depo. p. 41).

[17]Plaintiffs cavalierly brush this problem aside by classifying it as "minimal, if not non-existent." (Brief of appellants/plaintiffs, page 36).

separated out. While it is true that Todd indicated on many occasions that he felt that this would not be a problem, MacLeod, the person who had to make the recommendation, clearly and unequivocally stated that Northwestern would not consider a division of the property securing the loan (MacLeod Depo. pp. 28-31).

In response to questions from plaintiffs' counsel, MacLeod testified as follows:

> "There was one other feature, and that was that we could not consider or would not consider a division of the property securing the loan so as to enable part of the loan being attributable to the apartment complex and part of the loan have a separate loan attributable to the medical office building; so that whereas a sale of the apartment might be taken to Osmonds, our loan would have to stand on a composite property on the entire property. We were not persuaded to partition the loan. It would leave us with too small a balance on the office building portion." (MacLeod Depo. p. 29, Emphasis added).

Continuing on he stated:

> Q. That is, were there any concrete ideas as to how the partitioning of the property without the partitioning of the loan could be dealt with?
>
> A. Well, I think we just, off the top, kicked around how it might be effected within our disinclination to do it, as to who should receive the payment, as to whether they could lease back, I suppose. Well, as you might judge, what would be the ways something like that could be handled. And I believe that's what we simply focused on conversationally for a few minutes.
>
> Q. I assume it was clear to both of you then that there were ways that it could be done without--

A. No, I would assume--I wouldn't make that assumption. I would say instead it appeared as though there would be perhaps difficulty in that. Well, simply perhaps difficulty in that.

Q. And that was left to something--

A. Our position was pretty well defined; we couldn't countenance a division of the loan.

Q. Then I take it it was left that that would have to be worked out in some fashion between the Osmonds and Todd and Lignell so that it did not adversely affect Northwestern's position.

A. I would assume.

Mr. Bowen: Objection, leading.

A. I don't know that I would accept it anyway. It wasn't a matter of adversely affecting Northwestern's position because Northwestern wouldn't let its position be changed so that it would be adverse or beneficial. This is something we were not willing to consider.

We had a loan on the entire property and we were willing to consider an increase on that loan on terms consistent with current market, taking on Osmonds. But to go further and have separate loans was not a matter we would consider at all." (MacLeod Depo. pp. 29-31, Emphasis Added).

Although the Earnest Money Receipt and Offer to Purchase obligated the Osmond Brothers to assume the mortgage of $512,000.00, Todd testified that that was the total mortgage on both parcels of property and that 87% of that figure applied to the apartment complex and 13% to the dental building (T. 62).

Mr. Costley testified that he knew the Osmond Brothers weren't purchasing the dental building (T. 145). Mr. Callister testified that the Osmond Brothers would not assume the mortgage on the dental building (Callister Depo. pp. 39-40). Two

things, therefore, are readily apparent:

(1) The Osmonds apparently had offered to assume the full mortgage on both parcels of property when in actual fact they had only intended to assume 87% of that mortgage. Hence, there was, at best, a mistake in their offer and no meeting of the minds between the offerors and the offerees. Absent a meeting of the minds, even if the offer had been accepted, there could be no contract. Wicks v. Moyle, 103 Ut. 554, 137 P.2d 342 (1943).

(2) The offer was impossible to perform. The doctors insisted that the dental building be split out, the Osmonds were only purchasing the apartment building and Northwestern would not separate the parcels of property. See Stewart v. Lesin, 5 Ut.2d 383, 302 P.2d 714 (1956).

Although plaintiffs contend to the contrary, the evidence is clear that although the Osmonds may have been anxious and probably financially able to purchase the property, they were not ready to do so -- there were still too many details left to be finalized by them -- and they were not willing to do so upon the terms of the offer since they would not assume the full mortgage and they had not waived the 7% assumption requirement. In addition, they were not physically able to purchase the property since Northwestern would not divide the parcels. Even though the test in this case is not a ready, willing and able purchaser but the actual consummation of the sale, the Osmond Brothers did not meet even the more liberal test advocated by plaintiffs.

Both Callister and Costley testified that at their meeting of October 30, 1973, they discussed the possibility of providing some "incentives" to Northwestern to induce it to consent to the assumption. Both Costley and Callister, however, indicated that although they discussed what they might be willing to do, they did not finalize their discussions or come up with a concrete proposal or list of things that they would, in fact, be willing to do (T. 138, 213).[18] Further there was never an agreement to waive the 7% requirement (T. 138, 214).

D. Plaintiffs' Authorities Are Inapplicable To The Facts Upon Which The Trial Court Ruled.

The Trial Court found that the listing agreement in this matter was a special listing agreement, and that a condition precedent to the payment of any commission to H. Roger Boyer was the consummation of the transaction and actual receipt of the proceeds by defendants (Finding No. 4, R. 194). Plaintiffs do not contest this finding, and indeed they cannot since the evidence is absolutely clear on this point (Exhibit 1-P). It is the clearly established law in this state that on a special listing agreement of this type, a broker is not entitled to a commission if the desired sale is not, in fact,

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[18]Callister testified that the Osmonds might be willing to increase the loan rate by 1/4 to 1/2 percent (Callister Depo. p. 25), while Boyer indicated that the Osmonds would be willing to increase it by 2% (Boyer Depo. p. 46).

consummated, even though a ready, willing and able purchaser is found. Wicks v. Moyle, supra; Watson v. O'Dell, 58 Ut. 276, 198 P. 772 (1921).

Plaintiffs, however, seek to avoid the clear mandate of the law and place their hopes upon two cases, Hoyt v. Wasatch Homes and Curtis v. Mortensen, the facts of which are both inapposite here. In Curtis v. Mortensen, the broker had procured from the potential seller a general listing agreement for a period of six months which provided that the broker would be entitled to his commission if he produced a ready, willing and able buyer, clearly not the situation here. Further, the broker procured an Earnest Money Agreement, signed by both the buyer and the seller. Subsequent thereto, the seller changed his mind and the Earnest Money Agreement was rescinded by the parties. The distinctions in the instant case are obvious. Here there was no acceptance of the Earnest Money Agreement but rather a counter-offer was prepared, which counter-offer was not accepted by the buyers (Finding Nos. 10 and 11, R. 195). Even had it been accepted, since the buyers at no time waived the requirement that they be allowed to assume the 7% mortgage or obtain equivalent financing (T. 138), plaintiff, at best, would have produced a one-sided non-contract. The defendants had no power to require the Osmonds to buy or to otherwise perform since the Osmonds at any time could back out of the transaction by claiming that the condition precedent to their purchase, the assumption of the 7% loan, could not be accomplished and would not be waived by them. This very

proposition was recognized in the Curtis case wherein the Court stated:

> "It is obvious that the reason this court has stated in the above cited cases that a binding agreement or offer of the buyer is necessary if a broker is to be entitled to his commission is to protect the seller from being obligated to pay a commission where the proposed buyer either cannot or will not perform and the seller is left without a remedy which he can enforce against the buyer." Curtis v. Mortenson, 1 Ut.2d 354, 267 P.2d 237 (1954).

Thus, even had the counter-offer of defendants been accepted, there would still not have been created a binding contract until the Osmonds either assumed the loan or waived that requirement, neither of which occurred.

While it is true that the Hoyt case concerned a special listing agreement and although no sale was consummated a broker's commission was awarded, the facts of that case are far different from the facts in the instant case. In Hoyt, the seller had executed a binding contract to sell with the potential buyer. The seller was "bought off" by the buyer and the agreement was rescinded; thereafter, the sellers arbitrarily refused to cooperate in the consummation of the sale. Further, the real estate broker was procured by the sellers and was acting as their agent, and the court there found that the buyers were, in fact, ready, willing and able to perform.

In the instant case there was no binding agreement between the parties. Plaintiffs' offer was not accepted; defendants' counter-offer was not accepted; therefore, there

could be no rescision of a binding agreement as was found in Hoyt. Further, as set forth above, the Osmonds were not ready and willing to make the purchase upon the terms set forth in the respective offers. In fact, the purchase contemplated by the parties could not be consummated due to the impossibility of separating out the dental building. It should be further pointed out that in the instant case, the broker was the agent for the buyers, not the sellers, and that his involvement in the transaction was on behalf of his cousin's clients and the Shaughnessey Apartment was only one of many other parcels of property being investigated by plaintiff for the Osmonds at that time (T. 146, Callister Depo. p. 44).

In addition, there was neither a refusal to cooperate or a deliberate obstruction of the sale by defendants as was found in Hoyt. In Hoyt, the Court specifically did not deal with the question of whether or not a special listing agreement and the earnest money receipt could stand independently of one another, or whether the restricting feature in the special listing agreement, although not spelled out in the earnest money receipt and offer to purchase, was,nevertheless, a condition precedent to the recovery of a commission.

When faced with a similar question, the Supreme Court of Washington, in Harding v. Rock, 60 Wash. 2d 348, 363 P.2d 784 (1962) held that where the listing agreement provided for a broker's commission payable at the closing of a sale, and where the purchase agreement contained a different provision,

providing an unconditional promise to pay a commission, the limiting provision of the listing agreement, must be read in conjunction with the purchase agreement, and, hence, entitlement to a commission would accrue only upon the consummation of the sale. In the instant case, plaintiffs recognized that the limiting provision of the listing agreement was intended to carry through to the Earnest Money Receipt and Offer to Purchase. In fact, plaintiffs' counsel so stipulated during the trial of the cause (T. 44), and Todd so testified without contradiction (T. 43).

Since the plaintiffs agree that the payment of a commission under the Earnest Money Receipt and Offer to Purchase was not unconditional but was limited to the actual consummation of a sale, they should not now be heard to claim a commission absent a sale.

Further, this is not a case where the sellers procured a broker who worked diligently for them, produced a buyer upon the terms set forth by seller and obtained a fully executed agreement to purchase and then was cut off and left high and dry by his sellers who went behind his back and sold the property. In fact, Boyer stated that he didn't care who paid the commission, the Osmonds or the defendants (Boyer Depo. p. 23). It just happened that a commission provision was included in the Earnest Money Agreement. The testimony further indicated that the property was not even sold until 13 months later and then at a price far less than that contemplated in the Osmond Brothers transaction (T. 26).

Point IV

NEITHER THE EARNEST MONEY OFFER NOR DEFENDANTS' COUNTER-OFFER WERE EVER ACCEPTED

Plaintiffs apparently contend that the Court erred in its finding that the counter-offer was never accepted by the buyers (Finding No. 11, R. 195) and claim that that finding in reality implies acceptance.

Todd stated that the purported oral acceptance of Boyer was never communicated to him (T. 51-52). The Court accepted the testimony of Todd on this point (Finding No. 11, R. 195; Memorandum Decision ¶ 3, R. 187). That testimony is amply supported by the testimony of Costley, as has been previously pointed out. It is undisputed that there was no written acceptance of the counter-offer by anyone (Finding No. 12, R. 195).

Plaintiffs misapprehend what is involved here. Although plaintiffs contend that Callister and Costley thought they had a deal, the mere mental acceptance of an offer by an agent cannot give rise to a legally binding contract. Both Callister and Costley stated unequivocally that they did not communicate an acceptance of the counter-offer to defendants, neither did they accept the counter-offer in writing or authorize anyone else to do it on their behalf (T. 136, Callister Depo. p. 42). That they may have communicated their acceptance to Boyer, their agent, and formed in his mind a conclusion that the counter-offer was acceptable is still insufficient to

create a legally binding contract. Based on these premises, the Court's finding that there was no acceptance of the counter-offer in a legally binding fashion is sound.

Even if the Court had believed Boyer that the conversation of October 15th was as he claimed that too would have been insufficient to constitute an acceptance in a legally binding fashion for the following reasons: (1) the purported acceptance occurred more than one day after the counter-offer was made, (2) the purported acceptance was not in writing. See Frandsen v. Gerstner, 26 Ut.2d 180, 487 P.2d 697 (1971); and, (3) there is no evidence that Boyer as a sub-agent had authority to accept the counter-offer on behalf of the Osmonds. As a matter of fact, defendants contend the evidence clearly shows he had no such authority. Boyer journeyed to Ogden with the Earnest Money Agreement and obtained Costley's signature thereon on behalf of the Osmonds; further he knew he had to obtain the approval by Costley and Callister of the counter-offer. Absent that authority Boyer could accept the counter-offer in any fashion. See Equitable Realty Inc. v. Nielson, 30 Ut.2d 433, 519 P.2d 243 (1974); Frandsen v. Gerstner, 26 Ut.2d 180, 487 P.2d 697 (1971).

Point V

LACK OF AN ENFORCEABLE CONTRACT PRECLUDES RECOVERY BY PLAINTIFFS UNDER ANY THEORY.

Plaintiffs only raise objections to two of the Court's findings--No. 6 and No. 17. Therefore, the remaining unchallenged findings must be accepted by this Court. The Trial Court found that the defendants did not accept the proffered Earnest Money Receipt and Offer to Purchase, and that it expired by its own terms one day later and ceased to have any legal force or effect (Finding No. 10, R. 195). The Court further found that the acts of defendants constituted a counter-offer and that the counter-offer was never accepted by the proposed buyers, the Osmond Brothers (Finding No. 11, R. 195). See Lynn v. K. C. Ranches, Inc., 19 Ut.2d 3, 425 P.2d 403 (1967).

Boyer acknowledged that the Earnest Money Agreement was not accepted by the defendants (T. 238). In his telephone conversation with Mr. Callister, he indicated that the Earnest Money Agreement been had been changed (T. 183, Callister Depo. p. 20). There can be no doubt that since defendants did not agree to all of the provisions of the offer there was no binding contract. R. J. Daum Const. Co. v. Child, 122 Ut. 194, 247 P.2d 817 (1952). Bunnell v. Bills, 13 Ut.2d 83, 368 P.2d 597 (1962).

The corporate plaintiff's claim for entitlement to compensation is based exclusively upon the recitation in the

Earnest Money Receipt and Offer to Purchase. There can be no claim by the corporation under the listing agreement since that agreement was made with the individual plaintiff, H. Roger Boyer (Finding No. 4, R. 194), and none of the rights of that listing agreement were ever transferred to the corporate plaintiff (T. 224, Boyer Depo. pp. 59-60). The corporation's sole claim for compensation, therefore, is based upon a proposed contract that was never accepted and never became binding upon any of the parties thereto. Since there never was a contract, the language contained in that document upon which the corporate plaintiff relies is of no force or effect. This is true even if plaintiff corporation were properly licensed, and even if the facts were as plaintiffs contend; there is still no basis for the award of the requested commission. As this Court has stated:

> "Since defendants were not bound by the earnest money agreement, they were not as a matter of law, liable to pay the commission." Frandsen v. Gerstner, 26 Ut.2d 180, 487 P.2d 697 (1971).

The individual plaintiff, H. Roger Boyer's sole claim to compensation is based upon the special listing agreement between him and defendants. (Exhibit P-1, Memorandum Decision ¶1, R. 186. That agreement stated specifically that before any commission was paid the sale must be consummated. The evidence clearly showed that all efforts to consummate a sale of the property were done by the corporate plaintiff (T. 224, Boyer Depo. pp. 59-60), including the preparation of the Earnest Money Receipt and Offer to Purchase (Finding No. 7, R.

194). The Earnest Money Receipt does not provide for the payment of any commission to the individual, H. Roger Boyer. Rather, that document identifies the broker in three separate places as "The Boyer Company" (Exhibit 2-P, lines 1, 44 and 58).[19]

Point VI

THE CONDUCT OF THE PLAINTIFFS IN THIS MATTER WAS NOT OF THE TYPE THAT WOULD ENTITLE THEM TO COMPENSATION.

The conduct of the plaintiffs in the instant case is far different from that in the cases relied upon by them. Both Boyer and The Boyer Company were acting as the agents for the buyers. Boyer had participated in numerous meetings with the buyers regarding this and other transactions. Boyer was concerned with the Osmonds and not with the welfare of defendents. In fact, he freely discussed the buyer's ability to reduce the purchase price based on defendants' need for money. His only contact with the defendants, however, was by random telephone calls. On only one occasion did he have a meeting to discuss the transaction and that was at the request of defendants and at their expense at the University Club (T. 87).

The Earnest Money Agreement that was ultimately prepared was at variance with the listing agreement and as such

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[19]Had the Earnest Money Agreement been accepted, any commission due thereunder would, by its terms, have been payable only to The Boyer Company.

cannot give rise to a claim for compensation. See Lynn v. K.C. Ranches, Inc., 19 Ut.2d 3, 425 P.2d 403 (1967). Although the Earnest Money Agreement provided that the buyers were to assume the mortgage at 7% it did not require the consent to the transaction by Northwestern. Consent to the transaction was important to the sellers inasmuch as the failure of the insurance company to consent would obligate the sellers to pay a $35,000.00 penalty payment (T. 45 and 84, MacLeod Depo. p. 28). Boyer was aware of this prepayment penalty but did nothing about it. (T. 214). The earnest money in this case was delivered by the Osmonds to their agent, therefore, at no time was there any consideration passed binding the transaction. While it is true, as plaintiffs contend, that in many cases earnest money is not exchanged directly between the parties to a transaction but goes to one's agent, that situation is usually applicable where the real estate broker is representing the sellers. In those cases there is a transfer of consideration from the buyers to the sellers when the money is deposited with the seller's agent. In the instant case the money was transferred from the buyer to the buyers agent. There was no transfer of any type to the seller or seller's agent; therefore, there was no consideration exchanged in the transaction.[20]

The testimony is clear that H. Roger Boyer did little, if anything, to bring about the consummation of the sale. He

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[20] A situation roughly analogous to the one presented here was mentioned by the Court in Equitable Realty, Inc. v. Nielson, 30 Ut.2d 433, 519 P.2d 243 (1974).

left it to the doctors to work out all arrangements with the insurance company. Although he did telephone MacLeod on one occasion in an attempt to facilitate the transaction, this call was six days after he had been given permission to do so. He made no proposals to MacLeod or to Todd and gave no directions to Todd in his dealings with MacLeod. He made no offer of assistance to Todd in attempting to facilitate the transaction. In short, he sat back and let Todd attempt to earn his commission for him, secure in the knowledge that if the deal went through he would get his commission, and if it didn't go through he would sue. When it became apparent that the deal was not going to go through, he induced defendants to send him a letter terminating the transaction, but failed to advise them he was contemplating a suit for his commission even though he had been thinking about it for many days (T. 210-211).

After the sale was scuttled, the property remained on the market for another 13 months. It was ultimately sold by the doctors for less money than they had been offered in the Osmond transaction. The evidence is clear that Boyer himself failed to work diligently to bring about the sale of the property and therefore should not be entitled to a commission.

CONCLUSION

The findings entered by the Court are based upon clear and competent evidence and therefore must be sustained by this Court on appeal. The plaintiffs, having lost at trial, and

having lost on their motion to amend the Findings of Fact and Conclusions of Law, now seek on this appeal to raise the same precise issues that they twice raised in the Trial Court and twice lost. The attempt by plaintiffs to go behind the Findings and Conclusions other than to determine whether they are supported by the evidence, if sustained, would open up a Pandora's box, would allow a losing litigant to have three or four bites from the apple causing great confusion both at the trial and appellate level and would destroy the clear rules of appellate practice which have been long established in this state. This is particularly so in the instant case where the Court on two occasions, reflected upon the findings objected to by plaintiffs and found them to be in accordance with its ruling.

The statutes in this state are clear. A corporation must be licensed as a broker or it cannot sue to recover a real estate commission. In spite of the contentions of plaintiffs to the contrary the construction given to those statutes by the Real Estate Division recognized a distinction between an individual and a corporate broker. But even if they did not, such interpretations must give way to the clear mandate of the Legislature.

The plaintiff corporation made no attempt to become licensed or to otherwise qualify with the real estate division until approximately one month after the instant transaction failed; therefore, even if the statutory interpretation urged by plaintiffs were correct, plaintiff corporation cannot

recover. Its failure to timely apply for a real estate broker's license is fatal to its cause.

The evidence indicates that Todd worked diligently to bring about the consummation of the sale while plaintiffs, agents for the buyers, did little if anything. The findings of the Court that defendants exercised good faith and did not refuse to cooperate or otherwise block the sale are supported by ample and clear evidence and must be sustained on appeal. Further, the buyers procured by plaintiffs were not ready, willing and able to perform under the terms of the Earnest Money Agreement, as amended and the Court implicitly so found. The transaction, as contemplated was impossible to perform and the conditions placed in the agreement by the prospective purchasers had not been waived by them.

The overriding consideration, however, is that the corporate plaintiff's sole entitlement to compensation is based upon an Earnest Money Agreement that was never accepted by either one of the parties. A non-existent agreement cannot give rise to a valid obligation to pay based thereon. The individual plaintiff did not fulfill the terms of the listing agreement since no sale was consummated and he is precluded from recovery.

The judgment of the lower Court was entered after carefully considering the evidence, observing the demeanor of the witnesses and reviewing the exhibits. Its determination was again reviewed after extensive argument by counsel in relation to plaintiffs objection to the Findings and Conclusions. It

is in the province of the Trial Court to resolve areas of conflicting testimony and to render its judgment in accordance with the facts as determined. This careful consideration by the Trial Court should not be overturned on appeal. The judgment of the lower Court must be affirmed.

Respectfully submitted,

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