

1976

# Jerry Weaver v. Lawrence R. Modula and Lana G. Modula ; Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

JERRY WEAVER, d.b.a. REALEX REALTY,

Plaintiff and Appellant,

vs.

LAWRENCE R. MODULA and  
LANA G. MODULA,

Defendants and Respondents.

BRIEF OF APPELLANT

Appeal from a Judgment of the Second District Court  
for Davis County  
HONORABLE RONALD O. HYDE, Judge

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

- - - - -

JERRY WEAVER, d.b.a. REALEX REALTY,	:	
	:	
Plaintiff and Appellant,	:	
	:	
vs.	:	
	:	
LAWRENCE R. MODULA and	:	Case No. 14597
LAWA G. MODULA,	:	
	:	
Defendants and Respondents.	:	

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BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

The parties will be referred to as they appeared  
in the trial court in this brief.

NATURE OF THE CASE

This is an action by plaintiff to obtain his  
commission for the sale of defendants' home and for  
attorney's fees.

### DISPOSITION IN THE LOWER COURT

The District Court dismissed the plaintiff's cause of action and held for defendants on their counterclaim.

### RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal of the judgment against him, and judgment in his favor.

### STATEMENT OF FACTS

The plaintiff, Jerry Weaver, a realtor, and the defendants, Mr. and Mrs. Lawrence R. Modula, entered into a sales agency contract, Exhibit III, in April of 1974 for the sale of defendants' home located in Syracuse, Utah, and the defendants agreed to pay plaintiff a 6% sales commission.

The plaintiff found a buyer, Mr. and Mrs. Tracy Stevens. Thereafter, three earnest money agreements, Exhibits X, XI, and II, were signed by the buyer and defendants which finally led to the signing of a Real Estate Contract, Exhibit I, consummating the sale on August 27, 1974. The contract provided for payment

of \$1,951.95 cash, \$440.00 a month payments until the principal and interest were paid in full, and the buyer agreed to obtain a loan as soon as possible.

Because defendants needed \$1,900.00 cash to enable them to move into a condominium, the plaintiff delayed receiving part of his commission to a later time to help the defendants.

Following the sale, buyer continued to try to refinance the home to cash out defendants' equity. Efforts to arrange financing stalled during September, October and November because the economy experienced a recession, hitting a low point around September of 1974. Home loans became hard to obtain.

On December 11, 1974, the defendants and buyer signed an agreement of accord and satisfaction whereby they agreed to rescind their contract. Plaintiff brought suit to recover his commission on December 11, 1974, and the defendants counterclaimed.

Plaintiff believes that his commission was earned and due as of the signing of the real estate contract on August 27, 1974. Defendants disagree.

The District Court found that the plaintiff failed to perform the written agreement between the parties, the plaintiff breached his fiduciary relationship with the defendants and failed to make full disclosure to defendants of all pertinent facts concerning the loan, and dismissed the plaintiff's cause of action. The District Court also found that the defendants contributed \$286.00 toward the plaintiff's commission plus \$190.00 for a title policy, and that the defendants were entitled to attorney's fees of \$500.00 on the basis of fairness and equity.

#### ARGUMENT

##### POINT I

THE PLAINTIFF DID FULFILL HIS OBLIGATION BY PROVIDING A PURCHASER WHO WAS ABLE TO MAKE THE \$440.00 A MONTH PAYMENTS AND WHO WAS QUALIFIED TO OBTAIN A LOAN, AND HE PERFORMED TOTALLY THE WRITTEN AGREEMENT BETWEEN THE PARTIES.

A real estate broker has an obligation to produce a purchaser who is ready, willing and able to purchase the property at the seller's terms, and to do so without any dishonesty, fraud, or misrepresentation which would leave the seller vulnerable to a loss of his bargain. See F.M.A. Financial

Corporation v. Build, Inc., 17 Utah 2d 80, 404 P.2d 670 (1965).

The terms agreed to by the seller were first included in the sales agency contract, Exhibit III. It states:

During the life of this contract, if you find a party who is ready, able and willing to buy, lease or exchange said property or any part thereof, at said price and terms, or any other price or terms, to which I may agree in writing, or if said property or any part thereof is sold, leased or exchanged during said term by myself or any other party, I agree to pay a commission of 6% of such sale,...

"I" refers to the property owner, the defendants, in the above agreement, and "you" refers to the plaintiff.

The price and terms to which the defendants agreed in writing were set forth in the Uniform Real Estate Contract, Exhibit I, signed on August 27, 1974, which was the last written agreement signed by the defendants. It states:

3. Said buyer hereby agrees to enter into possession and pay for said described premises the sum of \$38,900.00 payable at the office of seller, his assigns or order at Security Title Company, Farmington, Utah, strictly within the following times, to wit:

\$1,951.95 cash, the receipt of which is hereby acknowledged, and the balance of \$36,948.05 shall be paid as follows: The sum of \$440.00 or more, on or before the 1st day of October, A.D. 1974, and the sum of \$440.00 or more, on or before the 1st day of each succeeding month thereafter until interest and principal are paid in full. Said payment includes interest, principal, taxes and fire insurance premiums, with the taxes and fire insurance premium to be paid by the seller at the due date of each and added on to the then contract balance. Buyers hereby agree to obtain a conventional loan of not to exceed 10% per annum, as soon as possible. Seller hereby agrees to assume and pay all expenses necessary and incident in obtaining said loan. (emphasis added)

The listing agreement required the plaintiff to find a ready, willing and able buyer according to the terms specified by the defendants in writing. The last agreement signed by defendants stated that \$440.00 would be paid each month until the balance was paid off, and that a loan would be obtained by the buyer as soon as possible. The contract did not state a time before which a loan had to be obtained. The District Court found that \$440.00 a month was an exceptionally high payment which acted as an incentive for the buyer to obtain the loan. The plaintiff also testified that if the buyer could not obtain financing, then the defen-

dants were willing to continue receiving the large monthly payments at the reflected rate of interest.

The Utah Supreme Court has helped clarify the burden that a real estate broker has to carry out in order to be entitled to his commission in F.M.A. Financial Corporation v. Build, Inc., supra. In that case, defendant, Build, Inc., listed an apartment house with Cook Realty Company, agreeing to pay a 5% commission. Defendant entered into an earnest money and exchange agreement to sell the apartment house, and executed a promissory note and a mortgage on a duplex as security on the note. Thereafter, Cook assigned the note to the plaintiff, payment on the note was stopped by defendant after four payments, and plaintiff brought suit. As a defense, defendant asserted that within sixty days after the sale of the apartment house the buyers became dissatisfied with the transaction, abandoned the property, and brought suit to rescind the purchase contract. The defendant alleged that it was a result of certain misrepresentations made about the property by Cook Realty. It appearing to the court that there was no actionable

misrepresentation by Cook Realty, the Supreme Court held that a real estate broker has an obligation to produce a purchaser who is ready, willing and able to purchase property according to the terms of the seller, and to do so without any dishonesty, fraud, or misrepresentation. Once this is done, the court held, a broker cannot be held to be an insurer against the possibility that the purchaser may become dissatisfied and sue to rescind.

In the case at hand, plaintiff produced a buyer who was ready, willing and able to purchase according to the terms of the defendants. On the basis of a \$17,000 a year salary, the buyer was able to make the \$440.00 a month payments which is not disputed, and the buyer was qualified to obtain a loan as the District Court found.

On November 8, 1974, 74 days after the sale was consummated, the defendants notified the buyers that they had until December 15, 1974, to obtain a loan to pay off the defendants' equity, because the defendants had become concerned about the condition of their home, as evidenced by their attorney's letter, Exhibit V,

dated November 8, 1974, which stated:

I am also going to advise Realex Realty of our position, because my clients are not going to allow their home to be wasted by your failure to keep the property up and then have the value of the home depreciated.

Since the buyer was not able to obtain financing due to the then existing money situation, the defendants and buyer subsequently agreed to rescind the contract on December 11, 1974.

Since the broker cannot be held to be an insurer against the possibility that the buyer will become dissatisfied and sue to rescind, as held in the F.M.A. Financial case, the plaintiff cannot be an insurer against the possibility that both the buyer and seller will become dissatisfied and agree to rescind because of unforeseeable circumstances, as they have done in the case at hand.

Therefore, the plaintiff performed his part of the written agreement by obtaining a purchaser who was ready, willing and able to purchase according to the written terms of the defendant, and should be entitled to his commission as long as there was no

dishonesty, fraud, or misrepresentation involved.

## POINT II

PAROL EVIDENCE IS NOT ADMISSIBLE TO CONTRADICT, ADD TO, VARY OR SUBTRACT FROM THE TERMS OF A WRITTEN AGREEMENT, AND THE SUPREME COURT SHOULD DISREGARD THE TESTIMONY OF WITNESSES SEEKING TO VARY THE TERMS OF AN OTHERWISE UNAMBIGUOUS CONTRACT, EVEN IN THE ABSENCE OF OBJECTION IN THE LOWER COURT.

Stated in general terms, parol evidence may not be given to change the terms of a written agreement which is clear, definite and unambiguous. This rule has been adopted and consistently affirmed in this state. See Strout General Realty Agency, Inc. v. Broderick, 522 P.2d 144 (1974); Rainford v. Rytting, 22 Utah 2d 252, 251 P.2d 769 (1969).

The case at hand involves the admission of parol or extrinsic evidence without objection to show that the written agreement entered into by the parties in April and on the 27th of August did not accurately reflect the agreement of the parties.

Defendants admit reading and signing the Uniform Real Estate Contract which provides, as stated under Point I above. Nevertheless, they contend that the plaintiff and defendants discussed orally that the

buyer was to receive his loan before the plaintiff was entitled to his commission. Defendants also testified, on page 13 of the transcript, that they were assured orally that the loan would go through within thirty days in a conversation at the time of signing the real estate contract on August 27, 1974. The plaintiff testified on page 60, that he could make no such guarantee and that it could take up to six months for the loan to go through, and that the defendants understood this.

The District Court found that the listing agreement called for a down payment equivalent to the defendants' equity, and that the plaintiff in obtaining the earnest money agreement and presumably the real estate contract, did so on the basis that the buyer would obtain immediate financing.

The point is that the written agreement did not state what the defendants' testimony indicated and what the court found. The terms were clear. Plaintiff would find a ready, willing and able buyer at the terms agreed in writing. The real estate contract provided that the buyer would pay \$440.00

a month and that the financing would be obtained as soon as possible. The contract did not state that a loan had to be obtained within thirty days for the deal to be final, or that the defendants had to get their equity before the plaintiff was entitled to his commission.

The courts have been unanimous in applying the parol evidence rule strictly to those documents in which the parties have made a distinct and complete writing of their agreement. In such a case the authorities are agreed that, in the event of misunderstanding, the documents shall be taken as conclusive evidence of their intention. 3 Jones on Evidence, §16:1 (6th Ed., page 72).

The parol evidence rule prevents other words from being added to or subtracted from those which the parties have deliberately set down in writing. The courts are not at liberty to speculate as to the subjective intention of the parties, they are charged with the duty of ascertaining the meaning of the written language. They cannot give effect to any intention which is not expressed by the language of the

instrument. In other words, if the intent and meaning may be ascertained in the language of the writing, it must be construed to mean what it says, and other evidence may not be received to give it new meaning.

3 Jones on Evidence, §16:18 (6th Ed., pages 120 through 121).

The Supreme Court was called upon to construe a written contract between a plaintiff broker and a defendant seller in Strout Western Realty Agency, Inc., v. Broderick, supra. That case was an appeal from a judgment against the plaintiff in an action to recover a real estate broker's commission after the defendant sold his own house. The defendant persuaded the trial court that the defendant agreed orally to pay the commission only in the event that the plaintiff, broker, sold the home, in spite of the written agreement that stated that the defendant agreed to pay the commission if a ready, willing and able buyer was procured by the plaintiff or anybody else, including the defendant. The Supreme Court reversed the trial court and held that the trial court erred in permitting oral testimony to vary the disputed paragraph and in finding

that the agreement as signed was not the agreement of the parties. The court stated that under the general rule, parol evidence may not be given to change the term of a written agreement which is clear, definite and unambiguous. Then the court explained that the policy behind this rule is the following:

...To permit that would to cast doubt upon the integrity of all contracts and leave the party to a solemn agreement at the mercy of the uncertainties of oral testimony given by one who in the subsequent light of events discovers that he made a bad bargain.

'...Without that rule there would be no assurance of the enforceability of a written contract. If such assurance were removed today from our law, general disaster would result, because of the consequent destruction of confidence, for the tremendous but closely adjusted machinery of modern business cannot function at all without confidence in the enforceability of contracts....'

In the case at bar, the listing agreement stated that the plaintiff was to be paid his commission if the plaintiff finds a buyer, ready, willing and able to purchase at the terms agreed in writing. The real estate contract stated that \$440.00 would be paid each month, until interest and principal are paid in full, and that buyer would obtain a loan as soon as

possible. By the defendants' oral testimony, they persuaded the District Court that the listing agreement called for the defendants to receive their equity before the 6% commission was earned by plaintiff, and that \$440.00 would be paid for one or two months, and that the buyers would obtain financing immediately, if not sooner, within thirty days, and that if financing could not be obtained immediately that the contract was void. The parol evidence clearly changes the meaning and intention of the unambiguous written agreement.

As was stated previously, parol evidence was permitted without objection from plaintiff's attorney. It is a general rule that an appellate court will consider only such questions as were raised in the lower court. However, the rule of waiver by failing to raise the objection in the trial court to parol evidence objectionable under the parol evidence rule is not one which has been universally accepted. Some courts have taken the position that if the terms of the written contract are free from ambiguity, the rights of the parties are to be determined and controlled thereby, without any effect being given

to testimony which would vary or contradict such terms, even though the testimony is admitted without objection. 92 A.L.R. at 819.

Plaintiff was not able to find any Utah cases on this point, but many states in our region have so held. In Folger v. Purkiser, 127 Cal.App. 554, 16 P.2d 305 (1932), the court held that although evidence was admitted without objection, of an oral agreement that the purchase price should be paid at a certain time, the appellate court must determine the time of performance without regard to the evidence of such oral agreement. It was stated that the parole evidence rule is not a rule of evidence, but is one of substantive law, and that the parties have not waived their right to urge the point on appeal that the evidence should be disregarded.

In an action by plaintiff for a real estate commission, the Supreme Court of Oregon in Ruff v. Boltz, 448 P.2d 549, 252 Or. 2d 236 (1968), reversed the lower court decision which ruled in favor of the defendant on the basis of oral testimony. The court held:

The parol evidence rule is the the rule of substantive law and will be applied whether or not objection is made to the admission of the evidence which violates the rule.

The rule in Utah should be the same, because the parol evidence rule is a rule of substantive law and parol evidence should be disregarded, even without objection in the trial court. Therefore, the court should disregard the parol evidence heard in the trial court, since it varies an already unambiguous contract.

### POINT III

THE DISTRICT COURT ERRED BY FINDING AND CONCLUDING THAT THE PLAINTIFF BREACHED HIS FIDUCIARY DUTY TO DEFENDANTS BY FAILING TO DISCLOSE THAT THERE WAS NO LOAN MONEY AVAILABLE TO PURCHASER.

Generally in actions by and against brokers the burden of proof is cast upon the party who asserts the affirmative of an issue raised by the pleading. 12 Am.Jur.2d §248, page 989.

Thus, in Martineau v. Hansen, 47 Utah 549, 155 P. 432 (1916), the Utah Supreme Court held that one employing a broker to find a purchaser of land has the burden of proving that false representations

were made by the broker as to the financial ability of the prospective purchaser. Martineau involved an action by the plaintiff, broker, against the defendant, seller, to recover judgment on a promissory note made by the defendant to plaintiff for a \$1,750.00 commission. The defendant raised the affirmative defense that false representations were made concerning the financial ability of the purchaser for the purpose of inducing the plaintiff to enter into the contract of sale and for the purpose of obtaining the commission evidenced by the note. The court stated:

It seems to us that, in view that the law presumes solvency and never presumes fraud or deceit, and in view that if a principal relies upon the defense of having been deceived by the broker with regard to the purchaser's financial ability to pay, he must allege the facts in that regard in his pleading, therefore he should also be required to assume the burden of proof to establish the facts thus pleaded. To that effect, as we read the decisions, is the weight of authority. We are of the opinion, therefore, that the burden of proof rested upon the defendant to prove the financial inability of Mr. Earl to pay, as well as to prove the fraud or bad faith charged against plaintiff.

Thus, the defendants herein had the burden of proving that plaintiff failed to disclose material

information to the defendants before they signed the real estate contract dated August 27, 1974. This defendants did not do.

The only evidence presented to the District Court concerning the plaintiff's knowledge at the time of signing the August 27, 1974, contract was, first, the testimony of Paula Sorenson, the loan officer from Zions First National Bank. She testified on page 88 of the transcript that the buyer, Mr. Stevens, was qualified for a loan, but when he applied for a loan in July or August of 1974 there were no conventional loan money available through her bank. However, she testified that she couldn't say what the situation was at other loan institutions.

On page 96 of the transcript, in answer to a question by counsel on whether there were signs of money being available for the Stevens' loan in light of the situation in Zions First National Bank where there absolutely was no money available, plaintiff testified as follows:

Q: Mr. Weaver, even though there was no money available for the Stevens' loan in August, were there other institutions that gave you indication that there may be funds available?

A: Yes, there certainly was. This was the only lender that said, you know, "we are not making any loans". But other lenders were. In fact, I wouldn't have been continuing to go to other places and taking my time and Mr. Stevens' time and Mr. Modula's, if I hadn't have thought there was some hope of obtaining a loan.

On page 65 of the transcript, plaintiff testified that he had taken the buyer to eight or ten different loan institutions and made applications at several of them. He said that they would make application and were led to believe that the institutions believed that they were going to be able to make the loan, and then would later turn it down.

All this occurred after the August 27, 1974, sale was consummated.

The only evidence that the defendants presented the court was their testimony on page 94 of the transcript, which was that plaintiff had never told them that no money was available. This is true, because the plaintiff did not know that there was no money available.

The summary of all of this testimony would indicate that the defendants were not aware that money was not available at the time the August 27, 1974, contract was signed. The extent of the plaintiff's knowledge was that some loan institutions were not making loans, and that is far short of knowledge that no money was available. This evidence does not satisfy the defendants' burden of proving that plaintiff withheld material information.

Furthermore, the defendants acknowledged that they were aware of the difficulty with loans at the time of signing the second and third earnest money agreements on August 10 and 17, 1974, on page 32 of the transcript.

It follows that they were also aware of the problem at the time of the signing of the real estate contract dated August 27, 1974. They were aware of what information the plaintiff had obtained; that there was difficulty in getting a loan. That is why the terms of the contract stated that the loan would be obtained as soon as possible instead of within a definite period of time, and why large monthly pay-

ments of \$440.00 would be made.

The defendants did not carry their burden of proving that material information concerning the buyer's loan was withheld according to the evidence. Therefore, the plaintiff did not breach his fiduciary duty.

#### POINT IV

#### THE DISTRICT COURT ERRED BY GRANTING ATTORNEY'S FEES AND COSTS TO DEFENDANTS.

The District Court awarded the defendants \$500.00 attorney's fees, stating that because the plaintiff had insisted on attorney's fees under the signed listing agreement, fairness and equity required the provision to work both ways. This was improper. The rule is well established that attorney's fees should not be awarded in the absence of statute or agreement between the parties.

In the sales agency contract signed by the defendants, the fifth clause states:

In case of the employment of an attorney to enforce any of the terms of this agreement, I agree to pay a reasonable attorney's fee and all costs of collection.

As stated previously, the language in the listing agreement makes it clear that the owner of

the property, the defendants, are giving the plaintiff authorization to take certain action necessary to sell the home. Therefore, the "I" in the above clause refers to the property owner, or defendants.

The Utah Supreme Court, in Hawkins v. Perry, 123 Utah 16, 253 P.2d 372 (1953), held that in the absence of statute or agreement between the parties, a litigant cannot be awarded attorney's fees. In that case, plaintiff gave money to his uncle to be used in purchasing a house, with the understanding that title would be taken in the uncle's name until plaintiff became of age, at which time it would be turned over to the plaintiff. Plaintiff had to file suit to recover the property and was awarded attorney's fees by the trial court, but the Supreme Court reversed, based on the holding above.

In the case at hand, there was a written agreement by the parties, but the terms of the agreement limited the awarding of attorney's fees to the plaintiff.

In Holland v. Brown, 15 Utah 2d 422, 394 P.2d 77 (1969), this court stated that the plaintiff's

rights to attorney's fees must be found, if at all, in the terms of the contract. That case involved a suit to enforce the written contract to purchase cookware for \$279.00 and for attorney's fees. The lower court awarded the plaintiff nominal damages and \$75.00 attorney's fees. The Supreme Court reversed the awarding of attorney's fees because the provision in the contract stated that in the case of repossession of merchandise, attorney's fees and court costs would be paid. The Supreme Court held that because there was no delivery of the merchandise, there could be no repossession, and hence the terms of the contract had no application.

Likewise, in the case at hand the contract limited payment of attorney's fees to plaintiff by the owner, and the plaintiff made no promise at all to pay attorney's fees.

The trial court based its awarding of attorney's fees on equity and fairness. This has no support in the cases, and in fact the Utah cases suggest quite the contrary.

In Carlson v. Hamilton, 8 Utah 2d 272, 332 P.2d 989 (1958), this court stated that people should

be able to contract on their own terms without indulgence of paternalism by courts in alleviation of one side or another from effects of a bad contract. That case involved a suit by a purchaser under a real estate contract for money paid to defendant sellers which the purchaser breached. The court stated that it is only where it turns out that one side or the other is to be penalized by enforcement of a contract so unconscionable that no fair-minded person would view the result without profound sense of injustice that equity will step in. The court held that where the sales price was \$22,000.00 and the plaintiff had paid \$6,680.00, it was not unconscionable for a defendant to keep the full \$6,680.00 as liquidated damaged under the forfeiture provision of the contract.

In our case, only the defendants promised to pay attorney's fees if it became necessary to collect plaintiff's commission. The plaintiff did not promise to pay attorney's fees in the event he lost the suit to collect his commission, or if the defendants brought suit. Once the terms are agreed upon, it

should not be rewritten as the District Court has done to relieve a party from its burden unless it is so unjust and so unconscionable as to provoke a profound sense of injustice. Under no circumstances do the cases suggest that the contract should be rewritten to impose a burden on a party.

Plaintiff's suit is not a frivolous claim nor one brought to harass the defendants. It is a reasonable, forthright claim for a commission on a sale involving a great deal of time and effort. The defendants' agreement and promise to pay attorney's fees falls far short from being unjust and unconscionable so as to allow equity to step in and rewrite the contract. The parties should be free to include whatever provisions they feel necessary for their own protection, and after two parties have agreed and signed a written agreement the court should not be allowed to step in and impose a burden on a party as the District Court has done.

Therefore, there being no promise by the plaintiff to pay attorney's fees nor any statute which would allow it, the plaintiff should be relieved from paying the defendants' attorney's fees.

### CONCLUSION

The plaintiff's obligation should be considered fulfilled because he found a ready, willing and able buyer according to the written terms of the defendants. Parol evidence admitted by the District Court without objection should be disregarded, since it adds to and changes the meaning of an already unambiguous and complete written contract.

The defendants failed to carry their burden of proving that the plaintiff withheld pertinent information concerning the buyers obtaining a loan and, therefore, there was no breach of a fiduciary duty.

Attorney's fees are not awardable in the absence of a statute or agreement, and equity should not rewrite an agreement to place a burden on the plaintiff under the facts of this case.

Respectfully submitted this 22nd day of July,  
1976.

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Jerry Weaver