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Walter v. Berkus Living Trust : Reply Brief

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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IN THE UTAH SUPREME COURT

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DOCKET NO. 960481-CA

ROBERT D. WALTER,

Plaintiff/Appellee,

vs.

THE JAMES AND RIA N. BERKUS
LIVING TRUST; and JAMES BERKUS
and RIA N. BERKUS, AS
GRANTORS AND TRUSTEES,

Defendants/Appellants.

960481-CA
Case No. 960012
(Priority No. 15)

JAMES BERKUS and RIA N. BERKUS,

Third-Party Plaintiffs,

vs.

BALD EAGLE REALTY, Inc., a
Utah corporation; JONATHAN
OLCH; and KATE DOORDAN,

Third-Party Defendants.

REPLY BRIEF OF APPELLANTS

APPEAL FROM FINAL ORDERS OF THE
THIRD JUDICIAL DISTRICT COURT OF SUMMIT COUNTY,
STATE OF UTAH, THE HONORABLE FRANK G. NOEL AND GLENN K. IWASAKI

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FILED

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CLERK SUPREME COURT

IN THE UTAH SUPREME COURT

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 Plaintiff/Appellee,)

vs.)

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I.

ARGUMENT

A. THE BUYER'S ERRONEOUS CONTENTION THAT THE SELLERS HAVE MISCHARACTERIZED SEVERAL CRUCIAL PIECES OF EVIDENCE IN THIS CASE SIMPLY DEMONSTRATES THAT THERE ARE NUMEROUS DISPUTED ISSUES OF MATERIAL FACT THAT PRECLUDE THE ENTRY OF SUMMARY JUDGMENT.

In an effort to salvage the Summary Judgment Orders on appeal, the Buyer suggests that the Sellers ". . . characterize several matters as 'fact' which are not supported by the record." (Appellee's Brief at 2). This suggestion, however, not only lacks merit, it actually fortifies the Sellers' claim that the Summary Judgment Orders were impermissibly entered in the face of genuinely disputed issues of material fact. These disputed factual issues include:

1. Did Kate Doordan Serve as the Assistant for the Buyer's Agent, Janet Olch?

Jonathan Olch, as the principal broker and sole shareholder of the Brokerage Company, testified in his deposition that Kate Doordan's ". . . job description might more accurately be described as [Janet Olch's] assistant." (R. 576). The Buyer, therefore, is incorrect in asserting that the Sellers have "mischaracteriz[ed]" the record by stating that Janet Olch's assistant at the Brokerage Company was Doordan. (Appellee's Brief at 2). Moreover, Doordan's admitted status as an employee of the Brokerage Company does not, as the Sellers suggest, preclude the possibility that she was serving simultaneously as the assistant for the Buyer's agent. Obviously, one who serves as an agent for one party does not lose that status simply because she may also be an employee of another party.

As the assistant for the Buyer's agent in the transaction at issue in this case, Doordan was the Buyer's subagent. The Sellers' notice of revocation to Doordan at 2:02 p.m. -- more than

eighty minutes before the Buyer completed his acceptance of the Counteroffer in the manner required by paragraph 23 of the Counteroffer -- constitutes notice to the Buyer.

2. How Extensive Were the Duties That Ms. Doordan Performed as the Assistant for the Buyer's Agent? The record establishes that Doordan held significant rights and performed extensive, important duties in her role as assistant for the Buyer's agent. These rights and duties included the authority to sign checks on behalf of the Buyer's agent and the obligation to assist the Buyer's agent in transmitting transactional documents and drafting and transmitting letters to clients of the Buyer's agent, including the Buyer in this case. (R. 593-95, 605-10, 625). The Buyer's dismissive suggestion that the services were merely "gratuitous in nature", see Appellee's Brief at 3, is unsubstantiated by the record.

3. If a Six Minute Telephone Call Begins at 2:02 p.m., at What Time Does it End? To support the suggestion that Doordan was physically incapable of notifying the Sellers' agent at 2:07 p.m. that she had just been instructed by the Sellers to revoke the Counteroffer, the Buyer claims that "[a] telephone call that begins at 2:02 and lasts six minutes ends at 2:08." (Appellee's Brief at 3). However, the fact that such a call actually ends at 2:07 is illustrated as follows:

<u>Time of Call</u>	<u>Number of Minutes Elapsed</u>
2:02 p.m.	1
2:03 p.m.	2
2:04 p.m.	3
2:05 p.m.	4

<u>Time of Call</u>	<u>Number of Minutes Elapsed</u>
2:06 p.m.	5
2:07 p.m.	6

Thus, Doordan's telephone conference with the Sellers ended at 2:07 p.m.¹ She was, therefore, able to call the Sellers' agent at a later point during the same minute at 2:07 p.m. -- the point at which the Sellers' agent received an incoming call -- to say that the Sellers had just revoked the Counteroffer.

4. After the Sellers Urgently Instructed Doordan to Withdraw the Counteroffer, How Quickly Did She Act? There is extensive direct and inferential evidence that Doordan acted immediately to inform the Sellers' agent that the Sellers had just revoked the Counteroffer. After Doordan received the Sellers' instruction to revoke the Counteroffer, her "mind set" was to assure that the Sellers' agent was informed of that fact. (R. 615). As such, she felt a "sense of urgency" to take care of the matter. (R. 587). "Responding as quickly as she could to [the Sellers'] request [to revoke the Counteroffer]," R. 587, Doordan telephoned the Sellers' agent and told him that the Sellers had "just called" to revoke the Counteroffer. (R. 586-87). The Sellers' agent remembers receiving such a call from her. (R. 585). The relevant telephone records reflect an incoming call to the Sellers' agent from Park City -- the location at which the Sellers had just reached Doordan -- which began at 2:07 p.m. (R. 557). As a matter of plausible inference, therefore, the Sellers' agent was informed in the 2:07 telephone call that the

¹ Not only is this conclusion arithmetically sound, it is consistent with the profit-driven incentive of telephone providers to charge customers for every minute of actual use. If customer usage were routinely calculated in the manner that the Buyer suggests, the telephone provider would lose one billable minute of otherwise-available charges in each of the millions of similar transactions for which it bills each month.

Sellers had revoked the Counteroffer. It defies credulity to believe that the Sellers' agent did not inform the Buyer's agent -- his wife -- of this fact when he spoke to her during their three-minute telephone call several minutes later.

5. Did the Buyer's Agent Feel an Increasing Sense of Urgency About Receiving the Buyer's Signed Acceptance of the Counteroffer During the Afternoon of January 27, 1994? It is undisputed that the Buyer's agent had a three-minute telephone discussion with the Sellers' agent (her husband) beginning at 2:11 p.m. (R. 633). The Buyer's agent testified in her deposition that her level of "concern" about expediting the Buyer's return of the signed acceptance of the Counteroffer was increasing after 2:00 p.m. Specifically, she testified that her anxiety level about receiving the Buyer's signed acceptance was higher" . . . between 2:00 p.m. and 3:00 p.m. on [January 27, 1994] than it had been before." (R. 599). Although the Buyer's agent testified that she often felt a "sense of urgency" in other transactions, R. 666, her testimony still establishes that in the transaction at issue in this case, her internally-felt need to receive the signed acceptance of the Counteroffer accelerated after she concluded her telephone call with the Sellers' agent at 2:13 p.m. The curious timing of her rapidly-increasing sense of urgency supports the inference that she was well aware of the Sellers' revocation of the Counteroffer by 2:13 p.m. -- more than one hour before she communicated the Buyer's "acceptance" to the Sellers' agent.²

² The heightened anxiety of the Buyer's agent in getting her client to telefax the signed Counteroffer from his office in Ohio to her office in Park City is reflected in the written chronology of events that the Sellers' agent and the Buyer's agent jointly prepared. (R. 632-34). That chronology shows that during the first 5½ hours of business up to 1:40 p.m. on January 27, 1994, the Buyer's agent and the Buyer had one brief telephone conversation. (R. 632). However, after the Buyer's agent spoke with the Sellers' agent for three minutes beginning at 2:11, she made three calls to, and received two calls from, the Buyer at an average interval of about every twenty minutes.

(continued...)

6. Was Katie Jenkins Serving as the Buyer's Administrative Assistant? The Buyer suggests that the Sellers' assertion that Doordan faxed a copy of the Sellers' revocation notice to the Buyer's "administrative assistant" ". . . is not supported by the record." (Appellee's Brief at 4). However, the Buyer's own legal counsel asserted in their summary judgment papers that Ms. Jenkins was serving as the Buyer's "administrative assistant." (R. 491). Although there admittedly is other evidence in the record to suggest that Ms. Jenkins was merely an employee of the Buyer's company -- and not an employee with authority to assist the Buyer in his personal transactions -- the presence of even some evidence supporting the Buyer's claim on this issue undercuts the Summary Judgment Orders.

7. At the Time the Buyer Supposedly Notified his Agent at 1:55 p.m. That he had Accepted the Counteroffer "as is", had the Buyer Actually Signed the Counteroffer as Required by Paragraph 23 of the Counteroffer? The Buyer suggests that an additional relevant fact is that he notified his agent at 1:55 p.m. that he had accepted the Counteroffer "as is." (Appellee's Brief at 4). According to the Buyer, this fact supports the conclusion that the Counteroffer was legally accepted at 2:50 p.m. when he signed it to signify his acceptance. This statement, however, ignores the plain language of paragraph 23 of the Counteroffer which requires the

²(...continued)

(R. 632-34). It is a plausible inference from these facts that the reason for the apparent desperation of the Buyer's agent to receive the Buyer's signed acceptance was her knowledge that the Sellers were seeking to revoke the Counteroffer and that her client had only a few fleeting minutes left in which to acquire the Property.

Moreover, even if the Court chooses to believe at this point that the reason for the Buyer's agent's increasing anxiety was simply her knowledge that another prospective buyer was submitting a back-up offer to purchase the Property -- a reason that makes no sense given the fact that the Counteroffer, by its own terms, was to remain open until 5:00 p.m. the next day -- this fact also supports the inference that the Buyer's agent was informed by the Sellers' agent of the revocation at the time she was told of the back-up offer at some point "shortly" after the 2:15 to 2:40 time frame.

occurrence of two specified events before any "acceptance" can occur: (i) the Buyer must sign the Counteroffer to indicate his acceptance, and (ii) the Buyer must communicate to the Sellers or their agent that the Counteroffer has been so signed. (Counteroffer ¶ 23; R. 71, 133). As such, the written acceptance could not have been communicated before the acceptance had actually been signed. Communication of the acceptance to the Buyer's agent occurred at "approximately 3:25 p.m." (R. 125). Thus, the earliest point at which the Counteroffer was accepted in the manner specified by paragraph 23 was "approximately 3:25 p.m." Whether that acceptance preceded or followed the notice of revocation that Doordan telephonically read to the Buyer's administrative assistant and telefaxed to the Buyer "no later than 3:25 p.m." is not resolvable through summary judgment.

* * *

The plainly disputed nature of these crucially important transactional facts precludes the entry of summary judgment. The Summary Judgment Orders should be vacated.

B. THE SELLERS' NOTICE OF REVOCATION TO DOORDAN AT 2:02 P.M. IS CHARGEABLE TO THE BUYER BECAUSE DOORDAN WAS ACTUALLY OR APPARENTLY SERVING AS JANET OLCH'S ASSISTANT, NOT BECAUSE JANET OLCH WAS SERVING AS THE SELLERS' AGENT.

The Buyer devotes nearly four pages of his brief to the unremarkable proposition that Janet Olch was contractually designated as the Buyer's agent. (Appellee's Brief at 9-12). The Sellers do not contend otherwise. The Buyer, however, completely ignores the factual record in attempting to demonstrate that Doordan, as Janet Olch's assistant, did not serve as Janet Olch's agent in the transaction. (Appellee's Brief at 16-18). Incredibly, the Buyer states that there is "no evidence" to substantiate the conclusion that Doordan performed myriad

transactional services for the Buyer's agent in connection with the Buyer's attempted purchase of the Property. This statement ignores the following evidence:

1. The deposition testimony of Jonathan Olch that Doordan's ". . . job description might more accurately be described as [the Buyer's agent's] assistant." (R. 576).

2. The deposition testimony of Doordan and Janet Olch that Doordan had authority to sign checks on Mrs. Olch's behalf; that Doordan often assisted her in transmitting offers, counteroffers, acceptances and other communications between transacting parties; and that Doordan, at Mrs. Olch's request, had prepared and transmitted the cover letter to the Buyer which accompanied the original Counteroffer. (R. 593-95, 605-10, 625).

3. The Sellers' Affidavit that they knew from their previous contacts with Doordan that she was closely involved with communicating the respective positions of the parties, including the faxing of transactional documents (R. 559).

4. The Sellers' Affidavit that their agent, Jonathan Olch, had previously informed them that Doordan was assisting both the Sellers' agent and the Buyer's agent in the sale and purchase of the Property and that if the Sellers' agent was unavailable, Doordan had up-to-the-minute information regarding its status (Id.).

The probative effect of these significant facts is not, in the context of a motion for summary judgment, extinguished or diminished by evidence that Doordan's formal contract of employment was with the Brokerage Company and her ". . . basic duties were that of a secretary/receptionist." (Appellee's Brief at 17). Nor is the probative weight of this evidence diminished by the Buyer's conclusory, unfounded suggestion that Doordan ". . . did not

represent Janet Olch's client." (Id.). The four significant facts cited above flatly contradict this suggestion.

In the final analysis, the Buyer's arguments on the issue of whether Doordan was serving as Janet Olch's agent are nothing more than closing arguments at trial to persuade the court to credit the facts that favor the Buyer and discount the facts that favor the Sellers. At this point, however, the obvious conflicts in the evidence are fatal to the Summary Judgment Orders.

C. THERE IS SUBSTANTIAL CIRCUMSTANTIAL EVIDENCE THAT THE BUYER'S AGENT WAS INFORMED OF THE SELLERS' REVOCATION OF THE COUNTEROFFER BEFORE THE BUYER COMPLETED HIS ATTEMPTED ACCEPTANCE OF THE COUNTEROFFER.

In attempting to downplay the clear importance of the relevant telephone records and deposition testimony which plausibly establish that the Buyer's agent was informed by 2:13 p.m. of the Seller's decision to revoke the Counteroffer -- more than one hour before the Buyer completed his attempted acceptance at 3:25 p.m. -- the Buyer calls this evidence "sheer speculation and conjecture." (Appellee's Brief at 13). This evidence, however, cannot be so casually dismissed.

The relevant telephone records and other evidence cut squarely against the Buyer's claim that he accepted the Counteroffer before he had actual or constructive notice of its revocation. The sequence and timing of the telephone calls from the Sellers to Doordan, from Doordan to Jonathan Olch (the Seller's Agent), from Jonathan Olch to Janet Olch (the Buyer's Agent), and from Janet Olch to the Buyer create an irresistible inference that the Buyer's agent had notice of the Seller's revocation more than one hour before the Buyer accepted the Counteroffer. These calls occurred as follows:

1. Telephone Call From the Sellers to Doordan. At 2:02 p.m., the Sellers called Doordan to revoke the Counteroffer. Lasting for six minutes, the call ended at 2:07. (R. 560, 564).

2. Incoming Telephone Call to Jonathan Olch. At 2:07 p.m., the Sellers' agent received an incoming call which, according to the bill, originated in Park City. This call lasted for three minutes. (R. 557).

3. Outgoing Telephone Call From Jonathan Olch to Janet Olch. At 2:11 p.m., right on the heels of Doordan's call to him, the Sellers' agent spoke to his wife, the Buyer's agent, for about three minutes. (R. 553, 598).

4. Telephone Calls Between Janet Olch and the Buyer at his Office in Ohio. Less than fifteen minutes later, the Buyer's agent called the Buyer's office. When the Buyer called her back at 2:39 p.m., she ". . . knew that [the Buyer] had to get going on [signing and returning the Counteroffer]," R. 600, even though the Counteroffer, by its terms, remained open until 5:00 p.m. the next day.

These facts create a strong inference that the Buyer's agent was informed of the Sellers' revocation more than one hour before the Buyer attempted to complete his "acceptance." The trial court's refusal to allow the Buyer to establish and rely on this inference at trial is reversible error.

D. THE EARLIEST POINT AT WHICH THE BUYER ACCEPTED THE COUNTEROFFER IN THE MANNER REQUIRED BY PARAGRAPH 23 OF THE OFFER WAS NO EARLIER THAN 3:25 P.M. ON JANUARY 27, 1994.

In an effort to rebut the proposition that there is a tribal issue of fact as to whether the Sellers' notice of revocation to the Buyer's administrative assistant "no later than 3:25 p.m."

preceded or followed the Buyer's attempted acceptance at "approximately 3:25 p.m.," the Buyer argues that he accepted the Counteroffer at 2:50 p.m. when he signed it to signify his acceptance. (Appellee's Brief at 18.) This argument, however, distorts the plain language of paragraph 23 of the Counteroffer.

The Counteroffer expressly requires the occurrence of two specified events before any "acceptance" could arise: (i) the Buyer must have signed the Counteroffer to indicate his acceptance, and (ii) the Buyer must have communicated to the Sellers or their agent that the Counteroffer had been so signed. (Counteroffer, ¶ 23). Although the Buyer asserts that he orally accepted the Counteroffer at 1:55 p.m., and that his agent, Janet Olch, informed the Sellers' agent, Jonathan Olch, of that oral acceptance at "approximately 2:11 p.m.," see R. 125, it is obvious that the attempted oral "acceptance" could not and did not constitute a legally sufficient acceptance in the express manner required by paragraph 23 of the Offer. That paragraph states that unless and until the Buyer signed the Counteroffer to indicate acceptance (an act that indisputably occurred at 2:50 p.m.) (R. 138) and communicated to the Sellers or their agent that the Counteroffer had been signed as required (an act that indisputably occurred at "approximately 3:25 p.m.") (R. 125), no acceptance arose. Therefore, the earliest point at which the Counteroffer was accepted in the manner specified by the Offer was "approximately 3:25 p.m." Whether that "acceptance" preceded or followed the notice of revocation that Doordan telephonically read to the Buyer's administrative assistant and telefaxed to the Buyer "no later than 3:25 p.m." is not resolvable through summary judgment. For this reason alone, the Summary Judgment Orders must be vacated.

II.

CONCLUSION

The Summary Judgment Orders and the Specific Performance Judgment must be reversed for at least three independent reasons.

First, the relevant deposition and affidavit testimony demonstrates that Kate Doordan was serving as the assistant for the Buyer's agent in this transaction. Doordan, therefore, was actually or apparently serving as an agent for the Buyer's agent in his aborted effort to acquire the Property. Thus, the Sellers' notification to Doordan at 2:02 p.m. of their revocation of the Counteroffer is, as a matter of law, chargeable to both the Buyer's agent and the Buyer. Because the Sellers' revocation preceded the Buyer's attempted acceptance, no enforceable contract came into being.

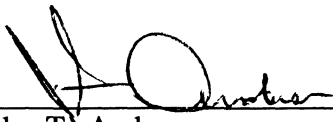
Second, there is a highly plausible inference from the underlying evidence that during their 2:11 p.m. telephone call, the Buyer's agent was actually notified by the Sellers' agent that the Counteroffer had been revoked. This notification was made more than one hour before the Buyer completed his attempted acceptance of the Counteroffer at "approximately 3:25 p.m." This inference, standing alone, creates a triable issue of fact as to whether the Sellers' revocation of the Counteroffer preceded or followed the Buyer's attempted acceptance.

Finally, the existing record is not clear on the issue of whether the Buyer's attempted completion of his acceptance of the Counteroffer at "approximately 3:25 p.m." occurred before or after Doordan telephonically notified the Buyer's administrative assistant and faxed the notice of revocation to the Buyer at "no later than 3:25 p.m."

For these reasons, the Summary Judgment Orders and the Specific Performance Judgment must be vacated. To the extent this Court concludes that Doordan was, as a matter of law, serving as the Buyer's subagent, the Sellers are entitled to the entry of a judgment declaring that no contract was ever reached. To the extent this Court determines that there are disputed, unresolved issues of material fact, the case should be remanded to the district court for trial. Under either disposition, the Sellers are entitled to recover all costs of this appeal.

DATED this 5 day of July, 1996.

ANDERSON & KARRENBURG



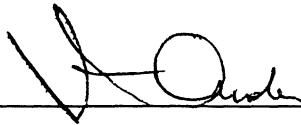
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CERTIFICATE OF SERVICE

I hereby certify that on this 5 day of July, 1996, I caused two true and correct copies of the foregoing **Reply Brief of Appellants** to be mailed, via first-class, postage prepaid, to the following:

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