

1976

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

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.

/

Case No. 14597

LAWRENCE R. MODULA and
LANA G. MODULA,

/

Defendants and
Respondents.

/

BRIEF OF RESPONDENTS

Appeal from the Judgment of the
Second District Court for Davis County
Honorable Ronald O. Hyde, Judge

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FILED

AUG 16 1976

Clerk, Supreme Court, Utah

TABLE OF CONTENTS

NATURE OF THE CASE.....	1
DISPOSITION IN LOWER COURT.....	2
RELIEF SOUGHT ON APPEAL.....	2
STATEMENT OF FACTS.....	2
ARGUMENT.....	14
POINT I	
THE APPELLANT BREACHED HIS DUTY TO RESPONDENTS IN FAILING TO FIND A QUALIFIED BUYER ABLE TO PURCHASE PROPERTY.....	14
POINT II	
APPELLANT HAD DUAL CAPACITY OF AGENT WITH FIDUCIARY OBLIGATIONS TO RESPONDENTS.....	21
POINT III	
RESPONDENTS ARE ENTITLED TO RECOVER ALL DAMAGES PROXIMATELY FLOWING FROM WRONGFUL ACTS OF APPELLANT.....	35
CONCLUSION.....	36

TABLE OF AUTHORITIES

CASE CITATIONS

<u>Babcock v. Merritt</u> 1 Colo.App. 84, 27 P. 882.....	18
<u>Crampton v. Irwin</u> 203 P. 672, Sup.Ct. of Colo., Jan., 1922.....	14
<u>Dobbs v. Johnson</u> 50 N.J. 528, 236 A.2d 843, 30 A.L.R.3rd 1370, (N.J. Sup.Ct., Dec. 18, 1967).....	19
<u>Hiniger v. Judy</u> 398 P.2d 305, Sup.Ct. of Kan. (Jan., 1965).....	18, 31
<u>Johns v. Ambrose-Williams & Company</u> 317 P.2d 897, Sup.Ct. of Colo. (1957).....	18
<u>Martineau v. Hansen</u> 47 Ut. 549, 155 P. 432.....	34, 35
<u>Morley v. J. Pagel Realty and Insurance</u> 550 P.2d 1104, Ct. of Appeals of Ariz. (June, 1976).....	28
<u>Pellatun v. Brunski</u> 231 P. 583, Dist.Ct. of Appeals of Calif. (Oct., 1924).....	17
<u>Rattray v. Scudder</u> 169 P.2d 371, Sup.Ct. of Calif. (1946).....	32
<u>Reese v. Harper</u> 8 Ut.2d 119, 329 P.2d 410, Sup.Ct. of Ut. (Sept., 1958)....	26
<u>Reich v. Christopoulos</u> 256 P.2d 238, Sup.Ct. of Ut.....	32
<u>Reynor v. Mackrill</u> 164 N.W. 335, Sup.Ct. of Io. (Oct., 1917).....	16
<u>Robertson v. Allen</u> 184 Fed. 372, 107 C.C.A. 254.....	17

<u>Rougren v. Lloyd Construction Company</u>	
22 Ut.2d 207, 450 P.2d 985 (1969).....	33
<u>Ruff v. Boltz</u>	
448 P.2d 549, 252 Or.2d 236 (1968).....	33
<u>Westco Realty, Inc., v. Drewry</u>	
515 P.2d 513, Ct. of Appeals of Wa., Sept., 1973.....	30
<u>Winkelman v. Allen</u>	
519 P.2d 1377, Sup.Ct. of Kan. (Mar., 1974).....	20

SECONDARY AUTHORITIES

Annotations

1 A.L.R. 528-532.....	16
4 Am.Jur., Brokers, Sec. 142, p. 1067.....	32
12 Am.Jur.2d, Brokers, Sec. 168 (1964), p. 909.....	30

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REALEX REALTY,

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Case No. 14597

LAWRENCE R. MODULA and
LANA G. MODULA,

/

Defendants and
Respondents.

/

BRIEF OF RESPONDENTS

NATURE OF THE CASE

This is an action brought by the Appellant, who was the Plaintiff in the Lower Court, seeking to obtain a commission for the alleged sale of the home of the Respondents, who were the Defendants in the Lower Court, as well as attorney's fees alleged required to be expended by the Appellant by reason of the action in the Lower Court and wherein the Respondents have filed a Counterclaim in the Lower Court seeking to recover from the Plaintiff the losses resulting to the Defendants by reason of the failure of the consummation of a sale of the

home undertaken by the Plaintiff, including the expenditure of attorney's fees made by the Respondents and Counterclaimants by reason of the failure of the sale of Respondents' home.

DISPOSITION IN LOWER COURT

The Lower Court dismissed the Appellant's cause of action and held for the Respondents on their Counterclaim.

RELIEF SOUGHT ON APPEAL

The Respondents seek affirmation of the Judgment of the Lower Court rendered in favor of the Respondents.

STATEMENT OF FACTS

The Respondents were desirous of selling their old home in order to build a new home, and prior to entering into a brokerage contract with the Appellant, advised the Appellant that the Respondents would need all of the equity that they could get out of their old home in order to have sufficient money to purchase land and build a new home. (R-101) The Respondents advised the Appellant, that they would accept nothing but cash for their equity and were interested only in obtaining qualified buyers, and the Respondents have testified that the Appellant stated that, "I'll bring only qualified buyers". (R-102)

That on April 12, 1974, a Sales Agency Contract was entered

into, wherein the Respondents were the sellers and the Appellant, as a real estate broker, was the sales agent of the Respondents and agreed at that time by the terms of the contract to obtain a price of \$38,900.00 on behalf of the Respondents and the agreement provided:

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, *** I agree to pay you a commission of 6 percent of such sale, lease, or exchange.
(Def.Exh.3) (Emphasis Added)

The Respondents testified that they believed that the condition of the sale of the listing for sale was that the person would be "qualified to purchase the home at that price" (R-102).

On July 20, 1974, an Earnest Money Agreement was entered into by and between the Respondents and Mr. and Mrs. Stephens as the buyers and who will be referred to herein as buyers, wherein they agreed to purchase the home for \$39,900.00 with \$500.00 down, leaving a balance of \$39,400.00 to be paid October 1, 1974, and the buyers obtaining a conventional loan of 95 percent, providing for the sellers to pay buyers closing costs, appraisal fees, taxes, and insurance reserves, providing further for the delivery of the final contract on August 16, 1974, buyers to pay the sum of \$368.00 monthly until the closing out of the Earnest Money Agreement by a conventional loan payment by

the buyers. The real estate broker listed on the Earnest Money Receipt and Offer to Purchase being the Appellant herein. (Def.Exh. 10)

The Respondents entered into the Earnest Money Agreement on the representation by the Appellant, that buyers had \$500.00 to put down and that they could buy out the Respondents' entire equity in accordance with the Agreement entered into. (R-104)

The original Agreement of July 20 was entered into by and between the Respondents and the buyers through the efforts of the Appellant and provided for no stipulation that the Respondents would carry any part of their equity on a contract but that they would be paid out entirely (R-105).

On August 10, 1974, a second Earnest Money Receipt and Offer to Purchase was submitted by the Appellant to the Respondents when said buyers made an offer of \$39,900.00 with a total downpayment, including the earnest money deposit, of \$2,000.00, including the closing costs, providing for the obtaining by the buyers of a conventional loan, to which the Respondents made a counter-offer providing for a sale price in the amount of \$38,900.00, and specifically stating that the seller (the Respondents) would not carry the total contract and that the buyer was to obtain financing immediately with the sellers carrying up to \$2,000.00 of the contract at \$75.00 a month and at a rate of 9-1/2

percent interest, and further providing that if the buyers wish to pay their own closing costs, that the price would be \$37,900.00 and the seller would carry \$3,000.00 of the contract. This earnest money counter-offer was accepted by the Respondents and the buyer on August 13, 1974 (Def.Exh.11). (Emphasis Added)

At the time that the Respondents entered into the Earnest Money Agreement on August 13, 1974, the Respondents advised the Appellant, who was the real estate agent and broker of the Respondents, that the Earnest Money Agreement presented on behalf of the buyers was going to create a hardship on the Respondents because the money which was to be obtained from the sale as the equity of the Respondents, was going to be needed to buy a new home and that the Respondents needed all of the equity, "everything I can get out of the home" (R-105), and the Appellant responded that if Respondents would carry the small amount of the equity of the Respondents as set forth in the Contract of August 13, 1974, it would guarantee and expedite the obtaining of a loan by the buyers. (R-106)

On August 17, 1974, the Appellant approached the Respondents and proposed a third Earnest Money Agreement providing for the Respondents to carry a contract balance in the sum of \$5,900.00 at 9-3/4 percent interest, the Appellant advising the Respondents, that such an agreement to carry a part of the equity would

guarantee the buyers obtaining a loan (R-106). The Respondents thereupon entered into a new Earnest Money Agreement on August 17, 1974, providing for a total selling price of \$38,900.00 with \$2,000.00 as earnest money and downpayment and the Deed would be delivered on August 29, 1974, and providing for monthly installments to be paid by the buyers to the Respondents of the sum of \$440.00 monthly until the buyers had obtained their financing and make arrangements for the closing of the loan. The Earnest Money Agreement was subscribed to by the Respondents and the buyers and also was signed by the Appellant as the real estate broker. (Def.Exh.2)

On August 23, 1974, the Appellant advised the Respondents, that the buyers wanted to move into the home before the start of the school year, which was on August 26, 1974, and that the Appellant felt that the loan was secure, that there should be no problems and that the buyers would not back out of the purchase of the home if they could get in before the school year. (R-107)

Respondents agreed to move out providing that the buyers would come up with the downpayment when the loan was closed out at Security Title Company. The Appellant advised the Respondents that this was only a temporary matter and in approximately thirty days the buyer would obtain his loan and that the Clearfield

State Bank had the funds and that there it was only necessary to wait until the Loan Officer return from vacation and that the loan was "pretty well guaranteed". (R-107,R-108)

In reliance upon the representations made by the Appellant, the Respondents moved out of their home on August 24, 1974, and the buyers moved into the home. At which time, only the Earnest Money Agreement had been signed and the closing of the Uniform Real Estate Contract was to take place at Security Title Company on August 27, 1974. (R-108)

Prior to the closing of the sale of the property and entering into a Uniform Real Estate Contract, the Respondents were assured by the Plaintiff, in a conversation which occurred at the premises of the Security Title Company in Farmington, wherein the Appellant assured the Respondents, that the buyers should receive their loan in approximately thirty days. (R-109) The Respondent stated that he was told by the Appellant, that the arrangement was only temporary, in that "approximately thirty days they (the buyers) should receive their loan", and the Respondent further testified that he would not have signed the Uniform Real Estate Contract had he known that he was not going to get the equity money from the buyers. (R-109)

The Uniform Real Estate Contract was entered into August 27, 1974, between the Respondents and the buyers in the presence

of the Appellant and provided for the sale of the home for a price of \$38,900.00, and further provided for a downpayment in the amount of \$1,951.95 with the buyer paying payments to Security Title Company in the amount of \$440.00 monthly, commencing October 1, 1974, with said payment including interest, principal, taxes, and fire insurance premiums. The buyers agreeing to obtain a conventional loan as soon as possible and the sellers agreeing to assume and pay all expenses necessary and incidental in obtaining the loan, and further providing that the Uniform Real Estate Contract was subject to an existing lien and encumbrance of Clearfield State Bank due and owing thereon in the sum of \$22,699.72. (Def.Exh.1)

The escrow and closing statement of Security Title Company evidenced a payment deducted from the cash downpayment paid to sellers in the amount of \$250.00 for the mortgage payment for August to Clearfield State Bank; the sum of \$139.00 for title insurance; a sales commission of \$2,274.00 to be paid to Appellant; closing costs in the amount of \$34.00; all to be paid by Respondents. The Respondents receiving a net remittance from the downpayment in the sum of \$1,681.00 with the sales commission being deferred. (Def.Exh.4)

In the closing statement, there was no provision made for payments of any monies out of the agreed monthly installment

of \$440.00 to be paid monthly by buyers for payment to the broker (Appellant) as and for sales commission on the sale of the property (Def.Exh.4). Security Title Company did, however, pay to the Appellant the sum of \$286.00 as part of Appellant's sales commission. (R-121)

The Respondents telephoned the Appellant approximately fifteen times and held conversations as to Respondents concerning finalizing the sale and obtaining their equity. (R-118) The Appellant continually reassuring the Respondents, that money was difficult to obtain, but advising the Respondents in the latter part of September and early part of October, 1974, that the loan could only be obtained by the buyers for approximately \$31,000.00 (R-122) and the Respondents then realized for the first time, that "things were looking grim". (R-123)

Upon the Appellant suggesting to the Respondents, that they should agree to a loss of points by accepting an F.H.A. loan by discounting the sale by \$1,500.00 or more, the Respondents then were aware that there was no longer a sale and that the buyer was not a qualified and able buyer and could not qualify for a conventional loan. (R-119)

The Respondent received monthly payments in the amount of \$250.00 on October 31, 1974, and \$250.00 on November 27, 1974, which evidenced that from the \$440.00 paid by the buyers

on monthly installments to Security Title Company, that \$143.00 was paid to Realex Realty, which is the company of the Appellant, each month, and that payments of \$46.00 were paid towards the title insurance and \$1.00 for escrow fee, leaving a net on each of the two checks in the amount of \$250.00, which amount represented the payment on Clearfield State Bank's secured lien so that the Respondents received no monies from the \$440.00 a month payments made for the months of October and November by the buyers. (Def.Exh.9) No other mortgage payments were made by the buyer nor received by the Respondents, other than the money set forth in Defendants' Exhibit 9 above. (R-149)

On October 18, 1974, the Respondent wrote a letter to Security Title advising Security Title not to pay other deductions from the amounts to be paid by the buyer and that, other than deduction of the \$46.33 in accordance with the closing statement, agreed upon and which sets forth the handling of the funds to be made by Security Title, that the balance of the money in the amount of \$393.67 must be turned over to the Respondents, who would then apply all of the funds to the balance due and owing to Clearfield State Bank. (Pl.Exh.1)

On November 8, 1974, Attorney Pete N. Vlahos, as Attorney for the Respondents, advised the buyers that the sellers had been advised by Mr. Weaver, that the loan would be secured by the buyers on or about the 1st day of October, and based

upon that representation, the home was sold and making demand upon the buyers to make immediate application for a loan pursuant to the Uniform Real Estate Contract, and that unless the loan was completed no later then December 15, that legal action would be taken against the buyers and the Appellant for the numerous representations made and the failure of the buyers to perform in accordance with their agreement. (Def.Exh.5)

On November 7, 1974, the Respondents sent a communication to the Appellant, advising that Respondents were induced to enter into an agreement to carry a part of the contract in the amount of \$5,900.00, in that the buyers had qualified for a 9-3/4 percent loan and could only qualify for a \$31,000.00 to \$32,000.00 (R-133,R-53), and the Respondent further stated:

I feel you have not protected my interests as you said you would and also I will notify Mr. Stephens of this action for this has been dragging on since late July. As per my letter to Mr. Stephens of September 16, 1974, I stated that thirty days from that date the loan should be obtained, but have received nothing but static over it. (R-53)

Mrs. Modula, one of the Respondents, corroborated the testimony of her spouse in affirming that in the conversation held with the Appellant prior to listing with the Appellant, that he was advised of the purpose of the sale of the home being for the Respondents to get all of their equity and that they would desire to be involved only with qualified buyers,

to which the Appellant agreed prior to the entering into of a brokerage agreement between the Respondents and the Appellant. (R-142,R-143)

The buyers called the Respondents and advised that they could not continue making payments of \$440.00 a month (R-176), and upon the failure of the buyers to obtain a loan, an Accord and Satisfaction was entered into by and between the Respondents and the buyers, wherein the buyers removed themselves from the premises and the property of the sellers, and upon the sellers, the Respondents herein, returning to the buyers the sum of \$1,500.00. The agreement was subscribed to on December 17, 1974, (Def.Exh.8) and subsequent thereto, the buyers moved to Arizona. (R-167)

The present action before the Court was commenced when the Appellant brought an action against the Respondents seeking to collect his commissions upon the real estate sale that never matured and for which the Respondents refunded the buyers most of the monies paid in by the buyers. The Appellant seeking to recover the sum of \$1,988.00, having already received the sum of \$286.00, making an alleged brokerage and sales fee to the Appellant claimed due and owing in the amount of \$2,274.00, and in addition to which the Appellant sought the highest legal rate of interest from August 27, 1974, plus attorney's fees

and costs of Court. (R-1 and 2)

The decision of the Lower Court as set forth in the Memorandum by the Court awarded a Judgment to the Respondents basing the Judgment upon the Sales Agency Contract entered into as between the Respondents and the Appellant and providing for the Appellant finding a buyer who was ready, able, and willing to purchase (emphasis by Court); the Court finding from the evidence before the Court and the record, that there was no money available for a straight mortgage; and that the buyer was not able to obtain financing (Court's emphasis); the Court setting forth that the Plaintiff entered into the final Earnest Money Agreement on the basis that the buyer would obtain immediate financing and that the Appellant was aware that the Defendants needed their equity out of the home and that obtaining that equity was part of the Appellant's and Respondents' agreement; that the Appellant was aware, or should have been aware, of the money situation and of the buyer's inability to obtain a straight financing; finding that the final contract entered into as between the Respondents and the buyer providing for a high monthly payment was only a temporary thing and was entered into based upon the buyer obtaining a loan to finance the purchase of the equity of the Respondents, and the further finding of the Court, that the Appellant breached

its fiduciary and agency relationship with the Respondents and in making full disclosure to the Respondents of information within the knowledge of the Appellant. (R-87,-88,-89)

ARGUMENT

POINT I

THE APPELLANT BREACHED HIS DUTY TO RESPONDENTS IN FAILING TO FIND A QUALIFIED BUYER ABLE TO PURCHASE PROPERTY.

The Sales Agency Contract entered into by and between the Appellant with the Respondents provided specifically the finding of a party who is "ready, able, and willing to buy". (Def.Exh.3) In the case of Crampton v. Irwin, 203 P. 672, the Supreme Court of Colorado, Jan., 1922, the Court held that in a suit by a broker for a commission for procuring a purchaser, that it is not necessary to show the financial ability of the purchaser, but the right to recovery is controlled by the rule that when a sale of land does not take place, that the broker cannot recover a commission unless the broker alleges and proves that he produced a person ready, willing, and able to purchase the property on the terms and conditions on which he was authorized to negotiate a sale.

The Appellant, after supposedly having qualified the Stephens as buyers, presented an Earnest Money Receipt and Offer to Purchase on July 20, 1974, for a price of \$39,900.00,

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setting forth that the buyers would obtain a conventional loan in the amount of 95 percent of the gross sales, less the earnest money of \$500.00, and the contract was never performed by the buyers (Def.Exh.10); approximately twenty days later on August 10, 1974, the Appellant brought an Earnest Money Receipt and Offer to Purchase from the same buyers setting forth the same purchase price and providing for a payment of \$2,000.00 down, providing for monthly installments of \$365.00 and for the seller to carry the contract until the buyer would be able to obtain financing, to which the Respondents did not agree and made a counter-offer which was subscribed to and accepted by the buyer for the sale of the property at a lesser sum, namely the amount of \$38,900.00 and providing for the buyer to obtain financing "immediately" and providing for the seller to carry up to \$2,000.00 on the contract at \$75.00 a month, with the seller carrying \$3,000.00, providing that the buyer paid all of the closing costs (Def.Exh.11); subsequently seven days later on August 17, 1974, the Appellant offered an Earnest Money Receipt and Offer to Purchase from the same buyer setting forth the price of \$38,900.00 with a \$2,000.00 downpayment and providing for the buyers to obtain a conventional loan as soon as possible, and providing for the sellers to carry a contract of \$5,900.00 as part of the downpayment, with monthly payments of \$440.00 to be made by

the buyers to the sellers until the loan had been arranged (Def.Exh.2), based upon the representations made by the Appellant, that the buyers would qualify for a \$31,000.00 to \$32,000.00 loan and would be able to close the deal out within thirty days. (R-106)

The Respondents relied upon the representations made by the buyers and the affirmation of the Appellant, that the loan would be consummated as soon as an officer of the Clearfield State Bank returned from vacation (R-107,-108), and believing the representation did then enter into a Uniform Real Estate Contract on August 27, 1974, which both the Respondents and the buyer believed only to be a temporary matter, in that the buyers could not afford to pay \$440.00 a month for an indefinite period of time. (R-167)

In Reynor v. Mackrill, 164 N.W. 335, the Supreme Court of Iowa (Oct., 1917), defined an able purchaser as follows:

To be able means that the purchaser must have the money at the time to make any cash payments that are required in order to meet the terms of the seller and does not simply mean that the purchaser have property upon which he could raise the amount if necessary; but, as stated, he must actually have the money to meet the cash payment and be in shape financially to meet any deferred payments.

1 A.L.R. 528-532 is an annotation on what constitutes ability to pay within rule as to brokerage right to commission

and clearly illustrates that in accordance with the facts heretofore set forth in this Brief, that the buyer was not an able and willing buyer and that the broker, the Appellant herein, should have reasonably known that the buyer would not qualify as an able buyer, and furthermore, the Statement of Facts set forth herein before show a continuous substitution of Earnest Money Agreements made by the Appellant, clearly evidencing the inability of the buyers to be able to enter into a loan and evidences that the Appellant was only seeking to maneuver himself into a position of collecting a commission rather than obtaining a real buyer able and willing to deal with the Respondents.

In Pellatun v. Brunski, 231 P. 583, District Court of Appeals of California (Oct., 1924), the Court defined the word "able", meaning financially able, stated:

This rule, however, does not mean that such purchaser must have all the money in his immediate possession or to his credit at a bank, but only that he must be able to command the necessary funds to close the deal within the time required.

In Robertson v. Allen, 184 Fed. 372, 107 C.C.A. 254, the Court held that:

A proposed purchaser cannot, therefore, be said to be able to purchase when he is dependent upon third parties, who are in no way bound to furnish the funds to make such purchase.

The evidence in the instant matter before this Court shows that the Appellant informed the Respondents, that the

buyers had \$2,500.00 put down as a downpayment for the purchase of the property (R-173), but that the Appellant had been told by the buyers that it would be necessary for them to borrow \$2,000.00 from the parents of Mr. Stephens in order to obtain a \$2,500.00 downpayment (R-173), which information was not given to the Respondents timely (R-174,R-175).

In Johns v. Ambrose-Williams & Company, 317 P.2d 897, Supreme Court of Colorado (1957), the Court stated:

This Court has repeatedly held that in these real estate commission cases, the broker, to sustain an action for commission, must do so by testimony that is clear and convincing, and we still adhere to that as a correct rule in such cases, and the reason for such rule cannot better be expressed than in one of the earliest decisions of our Court of Appeals, Babcock v. Merritt, 1 Colo.App. 84, 27 P. 882, which is stated as follows: "The law should be so defined and construed as to afford the owner of property some protection against the persistent claims of brokers who seek the recovery on purely technical grounds, and at the same time, assure to the broker compensation for services honestly and actually rendered."

In Hiniger v. Judy, 398 P.2d 305, Supreme Court of Kansas (Jan., 1965), the Court defined the Rule of Law as to when a broker is entitled to a commission by setting forth the following:

The general rule is that a real estate agent or broker is entitled to a commission if (a) he produces a buyer who is able, ready, and willing to purchase upon the proffered terms or upon terms acceptable to the principal; (b) he is the efficient and procuring cause of a consummated deal.

In Dobbs v. Johnson, 50 N.J. 528, 236 A.2d 843, 30 A.L.R.3rd 1370, (New Jersey Supreme Court, Dec. 18, 1967), the Supreme Court held that in order for a seller to be liable for the commission of a broker, that the following must be proven:

(1) That a court must read into every real estate brokerage agreement or contract of sale a requirement that, barring default by the seller, a commission shall not be deemed earned against the seller unless the contract of sale is performed, and that when there is substantial inequality of bargaining power, position, or advantage in the broker's favor, any provision to the contrary in an agreement prepared, presented, negotiated, or procured by the broker shall be deemed unenforceable.

(2) That as a matter of law, in the instant case, the owners were not liable to Plaintiff for the commission specified in the unconsummated contract of sale, since the buyer and owners had been brought together by Plaintiff and the failure to close title was due entirely to the buyer's financial incapacity to perform.

(3) That when a prospective buyer solicits a broker to find or show him property which he might be interested in buying, and the broker finds property satisfactory to him which the owner agrees to sell at the price offered, and the buyer knows that the broker will earn a commission for the sale from

the owner, the law will imply a promise on the part of the buyer to complete the transaction with the owner, and the buyer's failure or refusal to do so, without valid reason, renders him liable to the broker for breach of the implied promise***.

In Winkelman v. Allen, 519 P.2d 1377, Supreme Court of Kansas (Mar., 1974), the Court defined what it considers as the meaning of a purchaser of real estate financially ready and able to buy when it stated the following necessary conditions:

- (1) If he has the needed cash in his hand, or
- (2) If he is personally possessed of assets - which in part may consist of a property to be purchased - and a credit rating which enables him with reasonable certainty to command the requisite funds at the required time, or
- (3) If he has definitely arranged to raise the necessary money - or as much thereof as he is unable to supply personally - by obtaining a binding commitment for a loan to him for that purpose by a financially able third party.

The Court further stated that in order for a real estate broker to be entitled to a commission for producing a purchaser "able, ready, and willing" to purchase the property, that:

The broker has the obligation to inquire into the prospect's financial status and to establish his adequacy to fulfill the monetary conditions of the purchase. With this burden cast upon the real estate broker, the owner may accept his prospective

customer without being obligated to make an independent inquiry into his financial capacity, and the owner is not estopped to assert lack of financial capacity on the part of the prospective customer simply because he "accepted" the buyer in the course of negotiations.

The findings of the Lower Court in its Memorandum Decision by the specific finding that the buyer was not "able" to obtain financing; that the Plaintiff (Appellant) was aware that the Respondents needed their equity out of their home and the obtaining of that equity was part of the Appellant's and Respondents' agreement; and further, that the Appellant was aware, or should have been aware, of the money situation and of the buyer's inability to obtain straight financing. (R-87)

POINT II

APPELLANT HAD DUAL CAPACITY OF AGENT WITH FIDUCIARY OBLIGATIONS TO RESPONDENTS.

The Appellant testified that he was a real estate broker for Realex Realty (R-152) and that he entered into an agreement with the Respondents for the listing of the Respondents' home and for the sale of their home (R-153).

On April 14, 1974, the Appellant entered into a Sales Agency Contract with the Respondents as broker and agent for the sale of the home and real property at 1287 Marilyn, Syracuse, Utah, for the sale of the home at a price of \$38,900.00 and

providing for a conventional loan showing an existing mortgage on behalf of Clearfield State Bank of Clearfield, Utah, with a balance thereon in the amount of \$22,800.00. (Def.Exh.3)

The Sales Agency Contract provided that the broker, the Appellant herein, was to find a party ready, able, and willing to buy and was advised by the Respondents, that the purpose of selling the home was to obtain the cash equity out of the home that belonged to the Respondents, in that they desired to build a new home and needed the equity in order to acquire land and build the new home, which they intended to acquire by the sale of the existing home. (R-101)

The Appellant brought an Earnest Money Receipt and Offer to Purchase to the Respondents on July 20, 1974, wherein the Stephens were the buyers and wherein a purchase price of \$39,900.00 was set forth with \$500.00 down and the balance to be financed by a conventional loan of 95 percent, to which the buyers and the Respondents agreed and signed same. (Def.Exh.10)

Approximately twenty days later on August 10, 1974, the Appellant brought another Earnest Money Receipt and Offer to Purchase to the Respondents providing for a downpayment of \$2,000.00 against the purchase price of \$39,900.00 and seller to carry the contract until the buyer is able to obtain financing, and specifically providing for conventional financing, to which

a counter-offer was made by the Respondents to sell the home for \$38,900.00, and specifically provided that the seller would not carry the contract and that the buyer would obtain financing immediately and that the seller would carry up to \$2,000.00 on the contract at a specific monthly amount and interest rate on the contract.

Appellant on August 17, 1974, brought another Earnest Money Agreement to the Respondents concerning the same buyers and provided therein, that for a total purchase price of \$38,900.00 with a \$2,000.00 downpayment and for the Respondents to carry a contract balance in the amount of \$5,900.00 (Def. Exh.2). Appellant at that time advised the Respondents, that he had a lender who would loan \$31,000.00 to \$32,000.00 and that the deal would be closed within thirty days (R-118,-119).

The Appellant further advised the Respondent, that the buyers wanted to move into the home before the start of the school year, which was August 26, and he believed that the loan was secure and that there would be no problems, and upon that representation, the Respondents moved out of their home (R-107). Following the signing of the Earnest Money Agreement on August 17, the Respondents relying upon the qualification of the Stephens as an able and willing buyer entered into a Uniform Real Estate Contract, in that they had no other choice

in that they had moved out of their home and had turned possession of the home over to the alleged buyers and having expended monies in their new premises, which although temporary were intended to be used until they would buy and build their new home. (R-123)

The Appellant knew that the buyers had only been a few months in the area (R-166); that although the buyers told the Appellant that they were looking for a home in a range of approximately \$300.00 a month (R-167), that the temporary agreement of \$440.00 a month was entered as the amount to be paid monthly by the buyers; that the buyers, in fact, did not have \$2,500.00 to pay as a downpayment but had only \$500.00 and would have had to borrow the \$2,000.00 from their parents in order to be able to make a downpayment in excess of the \$500.00 (R-173); that the Appellant had contacted a large number of institutions all of whom had rejected the loan (R-161); that in fact the buyer did move out of the State not long after the Respondents had returned to the buyers the \$1,500.00 of their downpayment (R-167); that Zions Bank had advised the Appellant, that they were making no loans whatsoever on any real estate deal even with 25 percent down (R-184); all of which information was not revealed by the Appellant to the Respondents nor were they

advised thereof. That the Appellant did not consider himself as the exclusive agent of the Respondents, nor did the Appellant consider himself as being the fiduciary of the Respondents when in answer to questions and use of "we", the Appellant stated:

I would say that as things progress, while we did look at it, we all agree, and I might clarify it that when I say "we", it is myself, it's Mr. Modula, it's Mr. Stephens. Really, I was the agent for Mr. Modula in trying to work his interest and trying to work Mr. Stephens interest, so that they were both happy, and eventually, this is what it turned out to. (R-155) ***And then, as we progressed down along the same line, the same comments were brought up at Security Title and they (the Respondents) wanted Mr. Gurr to put this exact date in there; and, of course, Mr. Stephens, he just couldn't accept this type of a situation. I couldn't recommend that he get into that situation. (R-156)

In further regard to the Appellant's attitude of his relationship as between the Respondents as the sellers, himself as a real estate broker, and the buyers, the following Interrogatory was asked by the attorney for the Respondents and replied to by the Appellant as follows:

Q. You knew if you were acting in your fiduciary capacity that your responsibility was to the sellers; wasn't it? You had no obligation to the buyers? Your's was to the sellers; they were paying you the commission; they were the ones that had given you specific instructions; isn't that a fair statement,

Mr. Weaver?

A. Well, not completely. It's true that I have a fiduciary relationship, and I work for the sellers, and working for the sellers I also have to work for the buyers. And so I have to really serve both people. (R-169,R-170)

In Reese v. Harper, 8 Ut.2d 119, 329 P.2d 410, the Supreme Court of Utah (Sept., 1958), the question arose as to the nature and extent of the duty which a real estate agent owes to his principal and whether or not the Plaintiff discharged it. Mr. Harper was the seller and engaged the services of Mr. Reese for the sale of a farm, and asked that a buyer be found to purchase the property of Mr. Harper, wherein a \$45,000.00 price was set by the seller as the value he wished to receive. Five days after the agency agreement, the agent proposed to the seller a deal with a buyer for the property to be sold for \$30,000.00 and evidencing that there should be no encumbrances upon the sale of the property. The seller signed an Earnest Money Agreement to that affect and believed that the obligations which the seller had as encumbrances against the property in the amount of \$15,000.00 would be paid by the buyer, and that the \$30,000.00 represented the net amount to be paid to the seller. This would have given the seller approximately \$45,000.00 that they were asking. When the seller made a final determination, that the \$30,000.00 offer was not exclusive of the payment

of the encumbrances owed, but that same would be deducted from the amount, refused to sign the agreement and thereafter the broker filed suit against the seller for a commission on the sale of the property which had not been consummated.

The Utah Supreme Court held that:

The above contention is sound as between people dealing with each other under usual circumstances. But the relationship of real estate agent and client makes the situation quite different. The agent is issued a license and permitted to hold himself out to the public as qualified by training and experienced to render a specialized service in a field of real estate transactions. There rests upon him the responsibility of honestly and fairly representing the interest of those who engage his services, and upon failing to do so his license may be revoked. Accordingly, persons who entrust their business to such agents are entitled to repose some degree of confidence that they will be loyal to such trust, and that they will, with reasonable diligence and in good faith, represent the interests of their client. Unless the law demands this standard, instead of being the badge of competence and integrity it is supposed to be, the license would serve only as a foil to lure the unsuspecting public in to be duped by people more skilled and experienced in such affairs than are they, when they would be better off taken care of such business for themselves.

The Court then stated the Rule:

Because of the specialized service the real estate broker offers in acting as an agent for his client, there arises a fiduciary relationship between them; it is incumbent upon him to apply his abilities and knowledge to the advantage of the man he serves; and to make full disclosure of all facts which his principal should know in transacting the business. Failure to discharge such duty

with reasonable diligence and care precludes his recovery for the service he purports to be rendering.

The Court further observed that the broker was not discharged in duty, in that he had not explained the contract to his client nor called to the client's attention the variance in the terms, and upon suit of the broker for his commission, the Court held:

Under these circumstances, it was the duty of the agent to disclose to his principal the vast differences in the terms***. This duty was not discharged by simply handing to the owner an unsigned contract***. It was his duty to inform his principal of all facts which might influence his principal in accepting or rejecting the offer. An agent is not entitled to recover until he has fully performed this duty***.

In the instant matter before the Court, the Appellant herein appeared to be acting on the presumption that he was a fiduciary and an agent of both the seller and the buyer, and the Appellant did not reveal information which was made known to the Appellant which would have prevented the Respondents from suffering the time and loss of money which they suffered, and specifically, the Appellant had not continuously informed the Respondents of the inability of the buyer to be able to complete the transactions of the purchase of the property of the Respondents, and that the buyer, even if it can be conceded that he was willing, was not an "able" buyer.

In Morley v. J. Pagel Realty and Insurance, 550 P.2d

1104, the Court of Appeals of Arizona (June, 1976). The Court defined a duty of a real estate broker by reaffirming a previous decision of the Arizona Supreme Court in stating:

The real estate agent owes a duty of utmost good faith and loyalty to the principal, and one employed to sell property has the specific duty of exercising reasonable due care and diligence to effect a sale to the best advantage of the principal - that is, on the best terms and at the best price possible. ***He is also under a duty to disclose to his client information he possesses pertaining to the transaction in question.

At the time of the entering into the last Earnest Money Agreement and the subsequent Uniform Real Estate Contract, the Appellant was well aware that the arrangement by the buyer to pay \$440.00 a month was an arrangement that the buyer did not desire to continue, but was only a temporary arrangement until a loan was arranged, and further, the Appellant knew that it was not the intent, at any time, of the Respondents to carry the entire contract balance and continued to receive the monthly installments without the Respondents being paid for at least the remainder of their cash equity between the amount that the Respondents agreed to carry and the difference between the mortgage lien of Clearfield State Bank and the amount remaining would have been available to the Respondents for the purpose of buying a lot and constructing their new home, and that under no circumstances was the entering into

of a Uniform Real Estate Contract final in accordance with the desires and intent of either the Respondents or the buyers, and that the subsequent necessity of the Respondents paying back to the buyers \$1,500.00 of their downpayment in order to facilitate the buyers in removing themselves from the property of the sellers, could not under any circumstances have been a final sale so as to further encumber the Respondents with a total 6-percent brokerage fee due and owing by the Respondents to the Appellant for a sale of the property.

In Westco Realty, Inc., v. Drewry, 515 P.2d 513, Court of Appeals of Washington, Sept., 1973, the Court stated:

It is true, that as a general rule, a real estate broker becomes entitled to his commission as soon as he procures a purchaser who is accepted by the principal and with whom the principal enters into a binding and enforceable contract. ** It is also true, though, that this rule is not applicable where the principal's acceptance of the purchaser occurs under circumstances amounting to a breach of a broker's duty of loyalty to his principal.

In 12 Am.Jur.2d, Brokers, Sec. 168 (1964), at page 909, the rule is succinctly stated as follows:

A broker is not entitled to compensation if he fails to disclose to his principal any personal knowledge which he possesses relative to matters which are or may be material to his employer's interest, or if he acts adversely thereto, either for the purpose of aiding another or with a design of securing a secret profit for himself, or otherwise advancing his own welfare at the expense of that of his employer. (Emphasis Added)

In Hiniger v. Judy, supra, the Supreme Court of Kansas held that:

That the primary relation as between customer and real estate broker, is that of agency, the general rules of law applicable to principal and agent govern their rights and liabilities.

The Supreme Court of Kansas further stated:

Whether a broker has performed services entitling him to a commission is ordinarily a question of fact for the jury, if there is conflict in evidence or if there is any substantial evidence to support the essential elements of his cause of action.

The matter presently before this Court was heard by the Judge as a Trier of Facts and the Memorandum Decision of the Court after hearing all of the testimony and weighing the credibility of all witnesses found as follows:

The final contract, as entered into, called for exceptionally high payments that the Plaintiff alleged was put in there so that the buyer would obtain a loan. The Court finds that it was never the intention of the buyer and the seller to enter into the final contract as a final contract, but that it was a temporary thing based upon the buyer obtaining a loan and supplying the seller with his equity. **The total transaction from the beginning to the end was based upon the buyer obtaining a loan whereby the seller would obtain his equity from his property.

The Court finds that there was a fiduciary relationship between Plaintiff and Defendants which required Plaintiff to make full disclosure of all facts which his principal should know in transacting the business between them; and if the Defendants had been informed that there was

a good chance that the buyer would be unable to obtain financing because of the money situation, the final offer would have been rejected and the final contract would not have been entered into. (R-87, R-88)

The Trier of Fact further found that:

It appears that the Plaintiff was primarily interested in obtaining his commission and allowing Defendants to enter into the final contract under the belief, that the buyer was an able buyer and would obtain financing, and that the Plaintiff knew or should have known that there was no money available in order for the purchaser to complete the contract. (R-88)

In Ratray v. Scudder, 169 P.2d 371, the Supreme Court of California (1946), held that the duty imposed upon a real estate agent is the same obligation of undivided service and loyalty that it imposes upon a trustee in favor of his beneficiary. The California Supreme Court further stated that an agent is charged with a duty of fullest disclosure of all material facts concerning the transaction that might affect the principal's decision.

In Reich v. Christopoulos, 256 P.2d 238, the Supreme Court of Utah stated the rule of the duty of the agent and broker by adopting the definition set forth in 4 Am. Jur., Brokers, Section 142, page 1067, by quoting:

The faithful discharge of his duties is a condition precedent to any recovery upon the part of the broker for the services he has rendered to his

principal, thus, he is not entitled to compensation if he fails to disclose to his principals any personal knowledge which he possesses relative to matters which are or may be material to his employer's interest***.

The Appellant in its Point II makes a general allegation, that all of the testimony which was admitted in the Lower Court without objection by either of the parties hereto, which defined in general the state of mind and intent of the parties in entering into the contract, is in some ways non-admissible evidence, even though there had been no objection to same, and makes objection now for the first time in the Brief of the Appellant before this Court (Appellant's Brief, p. 10).

It is submitted to this Court, that in the case of Roungren v. Lloyd Construction Company, 22 Ut.2d 207, 450 P.2d 985 (1969), this Court stated:

***The Parol Evidence Rule, "while simple to state, is often confusing in its application, due largely to misunderstanding of its purposes; that is attempting to apply a rule rather than a reason". Consistent with that idea, that the Rule should not be regarded as applicable in rigidity and without exception, but in the light of reason under the particular circumstances, is this thought pertinent here: The fact that the parties have a written contract on a subject does not prevent them from entering into other agreements relating to the same general subject matter.

The Appellant in an attempt to support his theory of exclusion of Parol Evidence quoted from Ruff v. Boltz, 448 P.2d 549, 252 Or.2d 236 (1968) (Appellant's Brief, p. 16),

however an examination of the case evidences that the Oregon Court recognized an exception where there is an allegation of fraud, and it is pointed out to the Court, that the Counterclaim of the Respondents before the Court sets forth an allegation of fraud and deceit (R-3 - 6), that the Oregon Court held, that by the terms of the Parol Evidence Rule a showing of fraud is an exception to the prohibition on the use of Parol Evidence to vary a written contract.

The Appellant further cited in support of his position, that he had not breached a fiduciary duty by failing to disclose that there was no loan money available to purchaser, the case of Martineau v. Hansen, 47 Ut. 549, 155 P. 432 (Appellant's Brief, p. 17). The attention of the Court is called to the specific exception to a broker being entitled to the commission when the Court adopted the following citation from the Law of Agency, and stated:

Yet, if the principal in accepting him (the prospective purchaser) as a purchaser did not rely on his own judgment, but rather upon that of the broker, and the purchaser is not able to comply with his contract, the broker would not be entitled to commission; nor would he be entitled to commissions if the ratification was made on the strength of false statements made by him.

It is submitted to the Court, that the Respondents herein made no independent investigation whatsoever of the buyer,

but relied solely upon the skill of the broker in qualifying the prospective buyers, and in particular, the buyer involved in this transaction, and that, therefore, the exception set forth by this Court in the Martineau case, supra, is dispositive of this issue.

POINT III

RESPONDENTS ARE ENTITLED TO RECOVER ALL DAMAGES PROXIMATELY FLOWING FROM WRONGFUL ACTS OF APPELLANT.

The facts and the record before this Court are adequately covered by the Memorandum Decision of the Lower Court, wherein the Court found:

The obtaining of a title policy for purchaser who is not an able buyer is an expense attributable to the breach on Plaintiff's part. Defendants are granted Judgment on their Counterclaim for \$286.00 for the commission paid, \$190.00 for the title policy and costs. Defendants are further granted \$500.00 attorney's fees for the defense of this action. The granting of the attorney's fees is based upon Plaintiff's insistence upon attorney's fees under the agreement which fairness in equity and due process would require said provision to work both ways. (R-89)

It is submitted to this Court, that the action in the Lower Court was brought by the Appellant in an attempt to recover the total 6 percent on the selling price of the property in the amount of \$38,900.00, and that the Appellant sought in its Complaint to recover the attorney's fees and costs of Court.

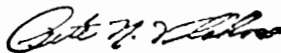
The Lower Court, sitting as a Court of equity as well as law, gave equity to the Respondents by awarding to the Respondents the sum determined by the Court to be reasonable and which was testified to by the Respondents as the amount agreed to be paid to their attorney, namely the sum of \$500.00, and it is submitted to the Court, that the Judgment of the Court was a fair and equitable award.

CONCLUSION

Respondents submit to this Honorable Court, that the conclusions of the Lower Court are valid and uncontradictable, that the Appellant undertook to find a buyer qualified and able to purchase the home of the Respondents, and that the buyer was not a qualified and able buyer, and that the obligation of the Appellant was that of one standing in a fiduciary relationship to the Respondents, as well as the Appellant being an agent of the Respondents, and that as such, the Appellant did not make complete revelation of all pertinent and substantive facts known to the Appellant concerning the ability of the buyer to be an able purchaser, and that the Appellant's inducement of the Respondents to enter into a contract of sale, which was never performed by the buyer and the consequent refund of the buyer's downpayment and cancellation of the sale by

the Respondents, was a proximate result of the breach of the obligations of the Appellant in his fiduciary and agency capacity to the Respondents; that the Respondents are further entitled to recover the closing costs and brokerage fees paid by Respondents and further, that the Appellant having sought by reason of a contract in writing providing for attorney's fees to collect same by initiating an action against the Respondents, that the Respondents having been found by the Lower Court to be the injured party should in equity receive the reasonable attorney's fees resulting to the Respondents by reason of the action brought by the Appellant in the Lower Court.

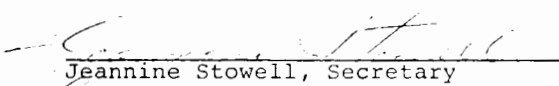
Respectfully submitted,



PETE N. VLAHOS
Attorney for Respondents

CERTIFICATE OF MAILING

A copy of the foregoing Brief of Respondents was posted in the U.S. mail postage prepaid and addressed to the Attorney for the Appellant, Stanley M. Smedley, 190 South Fort Lane, Suite 2, Layton, Utah 84041, on this 14 day of August, 1976.



Jeannine Stowell, Secretary