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Utah Supreme Court

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Mark S. Miner; Attorney for Respondents.
Kay M. Lewis; Kevin V. Olsen; Jensen and Lewis; Attorneys for Appellant.

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IN THE SUPREME COURT

OF THE STATE OF UTAH

ISRAEL PAGAN, Plaintiff- Respondent. vs. JOSEPH N. CANNON, DORIUS BLACK, ALPHA LEASING COMPANY, a partnership, ROBERT D. APGOOD, JOSEPH N. CANNON, DORIUS BLACK, and RICHARD McKEAN, doing business under the name and style of ALPHA LEASING COMPANY, BILL BROWN REALTY, INCORPORATED, SCOTT PEATROSS, personally, STEWART TITLE COMPANY OF UTAH, TOMMY W. SISK, CAPITOL THRIFT & LOAN a financial corporation, BACKMAN TITLE COMPANY, a financial corporation, and MERLYN HANKS, Defendants- Appellant.	)	860072-CA Case No. 20295

REPLY BRIEF OF APPELLANT

Appeal from a judgment on jury verdict rendered in the Third Judicial District Court, the Honorable J. Dennis Fredrick Presiding

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Kay M. Lewis
Kevin V. Olsen
JENSEN & LEWIS, P.C.
320 South 300 East, Suite 1
Salt Lake City, Utah 84111
Attorneys for Appellant

Mark S. Miner
525 Newhouse Building
10 Exchange Place
Salt Lake City, Utah 84111
Attorneys for Respondent

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Kay M. Lewis
Kevin V. Olsen
JENSEN & LEWIS, P.C.
320 South 300 East, Suite 1
Salt Lake City, Utah 84111
Attorneys for Appellant

Mark S. Miner
525 Newhouse Building
10 Exchange Place
Salt Lake City, Utah 84111
Attorneys for Respondent

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ARGUMENT

I

THE PLAINTIFF ARGUES FACTS WHICH ARE NOT SUPPORTED BY THE EVIDENCE.

The brief of the Respondent illustrates and emphasizes the Appellant's position that the jury's verdict was not supported by evidence nor by inferences which could be reasonably drawn therefrom, but was based on sympathy for the Plaintiff. It is apparent that the Plaintiff is

attempting to duplicate the same sentiments by referring continually to the Plaintiff's social, physical and mental condition. While a basic understanding of Plaintiff's condition is perhaps necessary to support his claim for fraud, the repeated assertions of facts such as the Plaintiff being referred to as "childish" or a "character" and that a casual observer would immediately recognize the Plaintiff's mental handicaps simply are not supported by the evidence. On the contrary, the evidence showed that the Plaintiff's mental condition was difficult to determine unless tested (T. 75) and that the Plaintiff's own agents felt that he was competent to understand the transaction (T. 374).

Other facts asserted by the Plaintiff likewise are not supported by the evidence in the record below. Those facts include the following:

1. There is no evidence supporting the Plaintiff's assertion that the lender was aware of Mr. Black's and Mr. Cannon's arrangements and plans for the property. In fact, there is testimony to the contrary. (See T. 50, 389).

2. There is no evidence supporting Plaintiff's assertions that Mr. Black was of a "notorious" character and reputation. Even if such were shown, there is no evidence showing the lender had any knowledge of such facts.

3. There is no evidence that the drafting of the Trust Deed by the lender was improper or unusual. In fact, it was shown to be the only practical method of preparing those documents from the lender's point of view.

4. There is no evidence showing that the terms of the loan were unusual. On the contrary, testimony was given indicating that such terms were usual and customary for the type of financial institution the lender was. (T. 392).

5. There is no evidence establishing the $4,848.75 paid to the lender was a "kickback". In fact, the only evidence presented was that the amount was believed paid as a "finder's fee." (T. 395)

6. There is no evidence showing that a mortgage of $24,000.00 being provided the Plaintiff was disregarded. On the contrary, the evidence showed him receiving a second trust deed in that amount. With the second Trust Deed and the $20,000.00 in cash and credits to the Plaintiff, there is no evidence supporting Plaintiff's assertion that the sales price of $44,000.00 was never considered.

7. There is no evidence that Joseph Cannon was judgment proof at the time of the transaction. On the contrary, testimony established him as being substantial and fully able to financially make the loan. (T. 386, 389, 394).

8. There is no evidence showing that the loan amount of $32,518.72 was improper or unusual. On the contrary, the evidence showed the amount to be proper in relation to the value of the security. (T. 394)

9. There is no evidence showing that the fees and charges charged against Plaintiff's $20,000.00 down payment by Stewart Title were improper or unusual. In fact, the testimony was the opposite.

10. The Plaintiff incorrectly asserts that payments were not made on the loan, when in fact testimony showed payments being made but not showing from whom. (T. 164)

11. There is no evidence showing that the lender participated in any way in the "switching" of buyers at the closing.

From the above, it is clear that there is no evidence supporting Plaintiff's theory of conspiracy to defraud. It should also be noted that contrary to Plaintiff's assertions, the jury verdict was not unanimous. Not only is there no evidence, but the inferences which must necessarily be drawn to support Plaintiff's theory are unfair and unreasonable. The reasoning for this argument is set forth in the Brief of Appellant.

II.

THE LENDER TIMELY OBJECTED TO THE JURY INSTRUCTIONS.

Rule 51 of the Utah Rules of Civil Procedure allows a party to assign as error the giving or the failure to give an instruction by objecting thereto. In the present case, objections were timely given to three instructions as argued in the Appellant's brief. Inasmuch as objections were timely made to each of those instructions, regardless of who submitted them, the Appellant should be allowed to have each of those instructions reviewed.

III.

A MOTION FOR A NEW TRIAL IS NOT A PRE-REQUISITE TO AN APPEAL.

In order to avoid the delay and expense incident to appeals, reversals, and new trials upon grounds which might have been corrected in the trial court if the question had been properly raised there, the Appellate courts have developed and applied the rule that they will normally only consider questions which were raised and reserved in the lower court. 5 Am. Jur. 2d Appeal and Error Sec. 545. This is the holding of Porcupine Resevoir Co. vs. Lloyd Keller, 15 Utah 2d 318, 392 P2d 620 (1964). The court did not hold that as a condition to an appeal, an Appellant must move the trial court for a new trial. In addition, the rules of Civil Procedure themselves do not set forth such a

pre-requisite. Furthermore, if a motion for a new trial were a pre-requisite to all appeals, there could be no appeal of those cases which did not have the facts supporting the grounds in Rule 59, which result is neither logical nor fair.

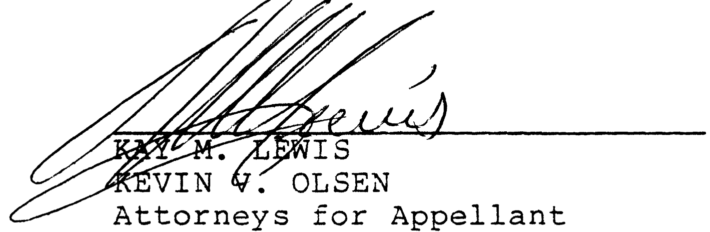
In the present case, each of the points appealed from were raised before the trial court below. This court's review, therefore, is proper.

CONCLUSION

The jury verdict must be reversed.

RESPECTFULLY submitted this 10 day of May, 1985.

JENSEN & LEWIS, P.C.



KAY M. LEWIS
KEVIN V. OLSEN
Attorneys for Appellant

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing Reply Brief of Appellant was hand delivered to Mark S. Miner, 525 Newhouse Building, 10 Exhange Place, Salt Lake City, Utah 84111 this 10 day of May, 1985.