

1977

Pete Falvo, dba Falvo Realty v. Joan A. Hoover : Brief of Plaintiff-Appellant

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *Falvo v. Hoover*, No. 15422 (Utah Supreme Court, 1977).
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IN THE SUPREME COURT
OF THE STATE OF UTAH

PETE FALVO, d/b/a FALVO)
REALTY,)
)
Plaintiff-Appellant,)
)
-vs-) Case No. 154)
)
JOAN A. HOOVER,)
)
Defendant-Respondent.)

BRIEF OF PLAINTIFF-APPELLANT

APPEAL FROM A PORTION OF A TRIAL JUDGMENT
BY THE THIRD DISTRICT COURT IN AND FOR SALT LAKE
COUNTY, STATE OF UTAH, PETER F. LEARY, JUDGE

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IN THE SUPREME COURT OF THE STATE OF UTAH

PETE FALVO, d/b/a FALVO)
REALTY,)

Plaintiff-Appellant,)

-vs-

Case No. 15422

JOAN A. HOOVER,)

Defendant-Respondent.)

BRIEF OF PLAINTIFF-APPELLANT

NATURE OF CASE

This is an action by Mr. and Mrs. Joe Lee Kosel to specifically enforce the sale of real property under the terms of an Earnest Money Receipt and Offer to Purchase Agreement. It is also an action by Pete Falvo, d/b/a Falvo Realty, to collect a six percent sales commission, under the terms of said Agreement.

DISPOSITION OF LOWER COURT

The Lower Court, sitting without a jury, determined that the Earnest Money Receipt and Offer to Purchase Agreement was a validly binding agreement and specifically enforced its terms. However, it awarded only forty (40%) percent of a six percent commission provided under that Agreement to the real estate salesman.

RELIEF SOUGHT ON APPEAL

The plaintiff-appellant, Pete Falvo, seeks this Court to reverse the Lower Court's decision limiting his real estate commission under the Earnest Money Receipt and Offer to Purchase contract. He seeks a Judgment for the 6% commission provided in said written agreement and to award him costs.

STATEMENT OF FACTS

The relevant facts for the issue on appeal are as follows:

1. On or about February 16, 1976, the owners of certain real property located at 2835 East Morgan Drive, Salt Lake City, Utah, executed an Earnest Money Receipt and Offer to Purchase agreement. This agreement, in addition to other ordinary provisions concerning the sale of Real Property, provided that the sellers would pay a commission of six (6) percent of the sale price of \$35,000.00 to the plaintiff-appellant. Plaintiff's Exhibit 3-P.

2. The sellers were in domestic difficulties. Thus, although Woodrow F. Hoover executed the closing documents on the premises, the defendant-respondent, Joan A. Hoover, refused to execute those documents.

3. Suite was filed seeking specific performance and after a non-jury trial, the Lower Court decreed the Earnest Money Receipt and Offer to Purchase was a valid and binding agreement in all particulars. It ordered specific performance on behalf of said seller. In addition, the Court also awarded

to the plaintiff-appellant attorney's fees and a sales commission. (R-40-41) However, the Judgment limited the said sales commission to 40% of the 6% sales commission provided in the Earnest Money Receipt and Offer to Purchase Agreement, a sum equalling \$840.00 (R-41).

4. The buyers or sellers have not appealed any part of the Court Order; however, the plaintiff-appellant real estate agent has appealed the reduction of the sales commission.

POINT I

THE LOWER COURT ABUSED ITS DISCRETION IN REDUCING THE PLAINTIFF-APPELLANT'S SALES COMMISSION, CONTRARY TO THE EXPRESS TERMS OF THE AGREEMENT BETWEEN THE PARTIES.

As heretofore set forth in the Statement of Facts, there is no contest concerning the validity of the agreement subject of this appeal.

The Court in its Findings of Facts and Conclusions of Law and its Judgment in this matter, has ruled that the Earnest Money Receipt and Offer to Purchase Agreement, dated February 16, 1976, was a validly binding agreement and subject to specific performance. (R-40-46). The sellers have conceeded this point by complying with the Court Order and by not filing any appeal or objection thereto.

The aforesaid contract expressly provided that a six percent sales commission would be paid to Pete Falvo, d/b/a Falvo Realty. The contract provided:

"The seller agrees in consideration of the efforts of the agent in procuring a purchaser, to pay said agent a commission of 6%." Exhibit 3-P, line 49 (Emphasis added).

That contract was duly executed by Respondent-Hoover and subsequently found to be binding and valid by the Court. (R-40).

Any dispute about the sales commission apparently stems from cross examination conducted by the attorney for the sellers. Under cross examination, appellant-Falvo correctly and honestly testified that he had an agreement, whereunder he had a contractual commitment to pay a portion of his six percent commission to the listing agent, Mr. Scott. That testimony was as follows:

"Q. (Mr. King) Now, you mentioned to counsel that there's six percent commission, but that includes the commission to Mr. Scott for listing; does it not?

"A. (Mr. Falvo) Yes, sir.

"Q. (Mr. King) What percentage of the commission does the selling agent get?

"A. (Mr. Falvo) In this case 40%, sir.

" ... that's 40 percent of the 60 percent (sic)?

"A. Of the six percent." (T-6).

Thus, the record is not in dispute that the sellers in a written binding contract agreed to pay to the appellant-Falvo six percent of the \$35,000. sales price or \$2,100. In turn, Mr. Falvo had a contractual agreement to pay the listing agent a percent of that commission. However, the Lower Court awarded to appellant-Falvo only 40 percent of the six percent sales commission, and subsequently refused a motion to modify the judgment and correct this error. (R-48-50).

After ordering the transcript, it appears that an error

in transcription was made by substituting the words "selling agent" for "listing agent"; thus, the wrong percentage was indicated to the selling agent, who I think the Court can take Judicial Knowledge, gets the larger sum. However, quite aside from the percentage share of the \$2,100 commission that each party gets, a gross injustice has been done. Appellant-Falvo was only awarded \$840., of which (under the present state of the record) he must give 60% to Mr. Scott as the listing agent. Under the reasoning of the Lower Court, Mr. Falvo will receive \$336 net, after payment Mr. Scott.

Certainly, the plaintiff has the burden of proof to establish damages; however, the writer knows of no law which authorizes such a result. Clearly, the testimony demonstrates Mr. Falvo had a contractual commitment to pay a percentage of his commission to the listing agent; however, he may well have had a set-off against that commission and never have been legally obligated to actually pay to Mr. Scott his listing commission. Further, one's disposition of an earned commission for obligations asserted against it by third parties because of a contract, attachments, assignments, garnishments or other dispositions, can be of no legal significance to the Hoovers, as the contractual debtors of Mr. Falvo. Those debtors have an obligation to pay their contractual commitments, regardless of the disposition of those proceeds that may or may not be imposed by other third parties.


in its construction of the undisputed evidence. The plaintiff-appellant Falvo, as the sales agent, is entitled to receive judgment for six percent of the sales price, which totals \$2,100. The collateral agreement between the listing agent and Mr. Falvo as the sales agent should not be considered by the Court or reduce Mr. Falvo's recovery. Therefore, the Lower Court judgment should be amended to award Mr. Falvo a judgment for real estate commission as provided in the agreement, totaling the sum of \$2,100.

CONCLUSION

A VALIDLY BINDING EARNEST MONEY RECEIPT AND OFFER TO PURCHASE DETERMINED BY THE COURT TO BE VALID BETWEEN THE PARTIES SHOULD HAVE ALL OF ITS TERMS ENFORCED, AS AGREED BETWEEN THE PARTIES. THEREFORE, THE AGREEMENT BY THE SELLERS TO PAY A SIX PERCENT SALES COMMISSION TO THE SELLING AGENT IS VALID AND SHOULD BE ENFORCED BY THE COURT, TOGETHER WITH THE OTHER PROVISIONS OF THAT AGREEMENT.

Therefore, the sales commission earned totaling \$2,100 should be awarded to the selling agent and appellant, Pete Falvo. The collateral agreement between said selling agent and the listing agent, concerning a division of that commission is a contractual matter between those parties. The Lower Court erred in limiting the said sales agent's commission by the percentage of that commission to which he would be entitled under the broker's selling agent's collateral agreement.

Respectfully submitted,



ROGER F. CUTLER, Attorney
Plaintiff-Appellant Pete Falvo

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing Brief of Plaintiff-Appellant was sent to Dwight L. King, Attorney for Defendant-Respondent, 2121 South State Street, Salt Lake City, Utah, 84115; postage prepaid, this _____ day of November, 1977.

ROGER F. CUTLER