1977

Diversified General Corporation, A Utah Corporation v. White Barn Golf Course, Inc., A Utah Corporation, Keith B. Downs, Albert Sanone, Aok Lands, Inc., A Utah Corporation, And John Does, 1 Through 8 Inclusive : Appellant's Brief

Utah Supreme Court

IN

DIVERSIFIED GENERAL CO
a Utah Corporation,

Plaintiff

vs.

BARN GOLF
Corporation,
SANDY,
a Utah
DOES I

IN THE SUPREME COURT

OF THE STATE OF UTAH

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DIVERSIFIED GENERAL CORPORATION, a Utah Corporation, Plaintiff and Appellant, vs. WHITE BARN GOLF COURSE, INC., a Utah Corporation, KEITH B. DOWNS, ALBERT SANONE, A OK LANDS INCORPORATED, a Utah Corporation, and JOHN DOES 1 Through 8 inclusive, Defendants and Respondents.	District Court No. 67122 Supreme Court No. 15462

Appeal from Summary Judgment of the Second District Court for Weber County, State of Utah

THE HONORABLE RONALD O. HYDE,
Presiding

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IN THE
SUPREME COURT
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---oooOooo---

DIVERSIFIED GENERAL CORPORATION, a Utah Corporation,	)	
Plaintiff and Appellant,	)	
vs.	)	CASE No. 15462
WHITE BARN GOLF COURSE, INC., a Utah Corporation, KEITH B. DOWNS, ALBERT SANONE, A OK LANDS INCORPORATED, a Utah Corporation, and JOHN DOES, 1 Through 8 inclusive.	)	
Defendants and Respondents.	)	

APPELLANT'S BRIEF

NATURE OF CASE

Plaintiff, Diversified General Corporation ("DGC"), brought this action to recover the balance of a "finder's" fee to which it deems itself entitled by the terms and provisions of a written and subsequent oral agreement with Defendant White Barn Golf Course, Inc. ("White Barn"), for having found a purchaser for certain real property owned and offered for sale by White Barn.

DISPOSITION IN LOWER COURT

Defendants filed a motion for summary judgment which was subsequently argued to and heard by the court. Summary judgment was awarded in favor of Defendants on the grounds that one who undertakes for a fee to secure a purchaser for property belonging to another comes within the purview of the Real Estate Broker's Statute, 7A UTAH CODE ANN. §61-2-1 et seq. (1953), which precludes an action for recovery of compensation by one not licensed as a real estate broker or salesman.

RELIEF SOUGHT ON APPEAL

DGC seeks an order reversing the decision of the lower court and setting aside summary judgment.

FACTS

On January 6, 1976, a "Finder's Agreement" ("Agreement") was executed between DGC and White Barn, whereby DGC was given the right to find a buyer for White Barn's golf course and condominium development. In the event that DGC were able to find a buyer and the sale were consummated, White Barn agreed to pay to DGC 13-1/3% of the sales price and convey a condominium to DGC. The Agreement specifically stated that no services other than those of a finder were to be rendered by DGC (Record at 7-8). Subsequent to the Agreement, DGC found a potential Buyer and introduced him to a White Barn representative. DGC did not participate in the

ensuing sales negotiations, nor in the preparation of sales documents and was not present at the closing (Record at 32).

Prior to the closing, however, DGC and White Barn orally agreed that DGC would not receive the condominium unit and would receive as its fee the amount of $150,000.00, only.

After the closing DGC agreed to the payment of its fee in installments, with a down payment of $35,000.00, which down payment was paid and received by DGC (Record at 3).

However, White Barn failed to pay the balance of the fee, and on March 28, 1977, DGC filed a complaint to recover the balance of $115,000.00. On June 9, 1977, the Defendants moved the lower court for summary judgment on the grounds that DGC's activities in finding a buyer were those of a real estate broker or salesman, that DGC was not a licensed broker or salesman, and therefore, could not lawfully recover a finder's fee (Record at 28-30). The motion was argued before the lower court on June 21, 1977. On August 30, 1977, the court, by memorandum decision (Record at 39-41) granted the motion for summary judgment, and summary judgment was entered in favor of Defendants on September 26, 1977 (Record at 48). Plaintiff thereafter filed this appeal on October 6, 1977.

ARGUMENT

The issue raised by this appeal, and narrowly drawn by the lower court's memorandum decision is simply whether the

real estate broker's statutes should apply to one who merely introduces a potential buyer to an owner and seller of real property.

POINT I

UTAH CASE LAW DISTINGUISHES BETWEEN A REAL ESTATE BROKER OR SALESMAN AND A FINDER AND ESTABLISHES THAT THE MERE INTRODUCTION OF A POTENTIAL BUYER TO A SELLER OF REAL PROPERTY DOES NOT OFFEND THE PUBLIC POLICY BEHIND NOR VIOLATE THE REAL ESTATE BROKER'S STATUTES.

The pertinent parts of the applicable statutes which Defendant claim require a finder to be licensed and which prohibit an action to recover compensation by one not so licensed are as follows:

> It shall be unlawful for any person, copartnership or corporation to engage in the business, act in the capacity of, advertise or assume to act as a real estate broker or a real estate salesman within this state without first obtaining a license under the provisions of this chapter.
>
> 7A UTAH CODE ANN. §61-2-1 (1953).
>
> The term "real estate broker" within the meaning of this chapter shall include all persons, partnerships, associations and corporations, foreign and domestic, who for another and for a fee, commission or other valuable consideration, or who in the expectation or upon the promise of receiving or collecting a fee, commission or other

> valuable consideration, . . . assists or directs in the procuring of prospects or the negotiations or closing of any transaction which does or is calculated to result in the sale, exchange, leasing or renting of any real estate. . . .
>
> 7A UTAH CODE ANN. §61-2-2 (1953).

> (a) No person, partnership, association or corporation shall bring or maintain an action in any court of this state for the recovery of commission, a fee, or compensation for any act done or service rendered the doing or rendering of which is prohibited under the provisions of this act to other than licensed real estate brokers, unless such person was duly licensed hereunder as a real estate broker at the time of the doing of such act or the rendering of such service. . . .
>
> 7A UTAH CODE ANN. §61-2-18 (1953).

A. Andersen v. Johnson.

There are principally two Utah cases dealing with and resolving the issue raised by this appeal. The first chronologically is Andersen v. Johnson, 108 Utah 417, 160 P.2d 725 (1945), in which the plaintiff entered into an oral agreement with defendant by which plaintiff obligated himself to assist defendant, who was a licensed real estate broker, in securing listings of real estate for sale by defendant. In consideration of plaintiff's services, defendant promised to give to plaintiff a full one-third portion of the commission earned by defendant as a result of any such listing and sale. Plaintiff was himself not licensed as a real estate broker or salesman. Plaintiff subsequently

introduced defendant to the owner of certain real property and defendant was thereby enabled to list and sell said property, earning a commission which, however, he refused to share with plaintiff as required by their agreement.

Plaintiff brought an action to recover his portion of the commission and defendant responded with a demurrer. The substance of the demurrer was that plaintiff, by assisting defendant to procure listings, had acted and should be classified as a real estate broker in accordance with the then statutory definition of the same, set forth in UTAH CODE ANN. §82-2-2 (1943) [now UTAH CODE ANN. §61-2-2 (1953)], which reads in pertinent part as follows:

> The term "real estate broker" within the meaning of this chapter shall include all persons . . . who with the intention or in the expectation or upon the promise of receiving or collecting a fee, commission, or other valuable consideration . . . assists or directs in the procuring of prospects . . . calculated to result in the sale . . . of any real estate. (emphasis added)

The district court agreed with defendant's proposition that plaintiff's assistance in securing listings made plaintiff a real estate broker, and since plaintiff was not licensed as such, he could not recover any portion of defendant's commission.

The supreme court, obviously uneasy about nullifying

an otherwise valid and bona fide agreement, reversed and remanded on the grounds that the term "prospects" as used in UTAH CODE ANN. §82-2-2 (1943), supra, referred only to those interested in purchasing realty and not to those wishing to sell:

> While it is necessary to secure listings, the term "real estate prospect" refers to one interested in the purchase of realty . . . and does not refer to one from whom you might secure a listing.
>
> Andersen v. Johnson, supra, at 729.

Justice Wade, in recognition of the awkwardness of the majority's dictum definition of "prospects" as potential purchasers but not sellers of realty, concurred in the result but offered more tenable and non-discriminatory reasoning for it:

> I cannot agree that the phrase 'assists or directs in the procuring of prospects' in Sec. 82-2-2, U.C.A. 1943, defining 'Real Estate Broker' is limited to 'one interested in the purchase of realty or in obtaining a lease of its use and does not refer to one from whom you might secure a listing' as stated in the prevailing opinion. I think the word 'prospect' includes the prospective seller of property as well as the prospective buyer.
>
> Andersen v. Johnson, supra, at 729 (Wade, J. concurring)

Justice Wade then furnished a public policy basis for excluding appellant from the coverage of UTAH CODE ANN. §82-2-2 (1943), supra:

> Whereas a literal reading of Sec. 82-2-2 would include anyone not specifically exempted therein, who, for compensation, was in any manner connected with a transaction involving real estate, as for instance a stenographer in a real estate broker's office who contacted people desiring a listing, I am of the opinion that such is not the intent or meaning of this section. A reading of the statutes regulating real estate brokers makes it apparent they were enacted for the benefit of the public to protect them from dishonest and unscrupulous real estate agents. Such protection of the public is not needed from the casual or remote influence of a stenographer or of a person who may wish to deal with him. Neither the stenographer nor the man who introduces the broker in the examples I have mentioned are active participants in any contract affecting real estate or any liability of the persons entering into such contracts or listings. The dealings which the statutes aim to protect the public in are those which result in legal liabilities between the parties. Nothing the stenographer or the man who introduces the real estate broker does, has that effect. This is true even though the real estate broker contracts to pay the man who introduces him a part of his commission in the event he makes a sale. (emphasis added)
>
> Andersen v. Johnson, supra, at 729-30 (Wade, J. concurring).

Justice Wade's resolution of the difficulty is superic to that of the majority in that it does away with the meaningless distinction between potential buyers and sellers, provides a more realistic and rational public policy basis for sustaining an agreement like the one in Andersen and avoids the harsh results and strained reasoning which frequently follow the bad law of hard cases.

B. Chase v. Morgan.

In Chase v. Morgan, 9 Utah 2d 125, 339 P.2d 1019 (1959), the second of the two principal Utah cases, the supreme court again confronted the real estate broker's statutes and this time the issue was whether appellant, who had supplied respondent with prospective purchasers for its oil and gas leases, was precluded by the statutes from recovering his agreed-upon compensation.

Justice Wade, this time writing the majority opinion, concluded that the appellant had violated the statutes because his agreement with respondent involved more than the mere introduction of a buyer; it authorized appellant to make the sales himself:

> It is clear from the above evidence that appellant and his associates were authorized to sell or negotiate the sale of the leases involved. Such an agreement contemplated more than the mere finding or introduction of a buyer and clearly was the sort of activity embraced within the definition of "Real estate broker" quoted above. (Emphasis added).
>
> Chase v. Morgan, supra, at 1021.

Consistent with his concurring opinion in Andersen, Justice Wade implies clearly in Chase that the mere finding or introduction of a buyer or seller is not enough to make one a broker because public policy does not require it.

His reason for holding that appellant in Chase had violated the statutes was that appellant had been more than a finder, i.e., he was authorized to go beyond mere finding and introducing and actually sell or negotiate the sale of respondent's leases. Clearly, such sales or negotiations, unlike a mere finding or introducing, would give rise to legal liabilities, and public policy would therefore mandate that appellant and other similarly situated be licensed and regulated for the protection of their principals, and those dealing with them. To again quote Justice Wade:

> The dealings which the statutes aim to protect the public in are those which result in legal liabilities between the parties.
>
> Andersen v. Johnson, supra, at 730.

As found and stated by the lower court in its memorandum decision, the case at bar involves the mere contacting and introducing of a potential buyer and nothing more (Record at 39). Indeed, the written agreement executed by appellant and respondent in the case at bar specified that no other services than those of a "finder" were to be rendered by appellant (Record at 8), which makes the case at bar quite distinguishable from Chase.

A consideration of its facts shows the case at bar to be very similar to Andersen, the only pertinent distinction being that in Andersen appellant introduced a prospective seller and in the case at bar appellant introduced a buyer. In neither case did appellant presume to sell or negotiate a sale without a broker's license, in neither case did appellant agree or receive authorization to sell or negotiate a sale, and it should follow that in neither case will appellant be denied recovery of compensation bargained for and earned.

POINT II

UTAH LAW AS HERETOFORE DISCUSSED IS CONSISTENT WITH THAT OF CALIFORNIA WHICH HAS LONG DISTINGUISHED BETWEEN REAL ESTATE BROKERS OR SALESMEN AND FINDERS.

California courts have long recognized the important distinction between real estate brokers or salesmen and finders and have, accordingly, excluded finders from the coverage of the California statutes defining real estate brokers, even though such statutes define brokers to include those who solicit for prospective purchasers. Tyrone v. Kelley, 106 Cal. Rptr. 761, 507 P.2d 65, at 70 n.5 (1973).

The court in Tyrone speaks very cogently about the distinction between brokers and finders and the policy reasons

for recognizing it:

> Defendants urge that Tyrone is not entitled to a judgment against them on the agreement since he performed the services of a real estate broker in California, but was not licensed as a broker in California. They maintain that his recovery is barred under the provisions of section 10136 of the Business and Professions Code and related sections.
>
> Numerous cases have held that one who simply finds and introduces two parties to a real estate transaction need not be licensed as a real estate broker. Such an intermediary or middleman is protected by the finder's exception to the real estate licensing laws, an exception first established in Shaffer v. Beinhorn (1923) 190 Cal. 569, 573-574, 213 P. 960. In that case, this court held that a person who contracted to introduce a seller to a prospective purchaser did not act as a broker but as a finder. Many subsequent cases have recognized the exception. (See, e.g., Batson v. Strehlow, 68 Cal.2d 662, 669 68 Cal.Rptr. 589, 441 P.2d 101; Davis v. Chipman, 210 Cal.609 619-620, 293 P.40; Zappas v. King Williams Press, Inc., 10 Cal.App.3d 768, 772-773, 89 Cal.Rptr. 307; Hasckian v. Krotz, 268 Cal.App.2d 311, 319-324, 74 Cal.Rptr. 410; Porter v. Cirod, Inc., 242 Cal.App.2d 761, 762-763, 51 Cal.Rptr. 784; Evans v. Riverside Internat. Raceway, 237 Cal.App.2d 666, 675-677, 47 Cal.Rptr. 187; Spiclberg v. Granz, 185 Cal.App.2d 283, 290-291, 8 Cal.Rptr. 190; Palmer v. Wahler, 133 Cal.App.2d 705, 708-711, 285 P.2d 8; Freeman v. Jergins, 125 Cal.App.2d 536, 546-551, 271 P.2d 210; Crofoot v. Spivak, 113 Cal.App.2d 146, 147-148, 248 P.2d 45; Rhode v. Bartholomew, 94 Cal.App.2d 272, 279-282, 210 P.2d 768.)
>
> The finder is a person whose employment is limited to bringing the parties together so that they may negotiate their own contract, and the distinction between the finder and the broker frequently turns upon whether the intermediary has been invested with authority to participate in negotiations. (See, e.g., Batson v. Strehlow, supra, 68 Cal.2d 662, 669, 68 Cal.Rptr. 589, 441 P.2d 1001; Davis v. Chipman, supra, 210 Cal.609, 619-620, 293 P.40.) . . .

One who merely introduces two parties to a real estate transaction, whether or not he solicits those persons, does not need to be as knowledgeable about real estate transactions as a licensed broker, unless, of course, he participates in the negotiations . . . . Unless he enters into the negotiation of the transaction or other activities beyond introduction, he need not be well versed in real estate law or in real estate economics and appraising.

It is true that the finder's exception presents a seeming anomaly in our law. In general, an unlicensed individual may recover an agreed compensation where he merely finds a buyer, seller, lender, or borrower, but if in addition to finding such person he goes further and helps to conclude the transaction by taking part in negotiating the details of the transaction, compromising or composing differences between the parties, by way of example, he may not recover the agreed compensation.

Nevertheless, when viewed in the light of the competing public policies the finder's exception is not anomalous. Fundamental to our law is the basic principle that persons should perform their contracts, and when they breach their agreements, action should ordinarily lie to enforce contractual duties. On the other hand, the promotion of competency and integrity in those called upon by the public to perform complex duties involving trust is a salutary purpose, and the policy underlying the licensing statutes must be given full effect. Neither considerations of competency nor of trust are of importance where the undertaking is merely to seek out, locate, find and introduce a buyer, seller, borrower, or lender to his counterpart or where negotiations and completion of the transaction are left completely to the principals. By enforcing the promise to pay a finder's fee we give effect to the policy of enforcement of contracts in cases where the policy underlying the licensing statute does not directly apply. It is for the Legislature, not this court, to determine whether the finder's exception should be terminated.

Tyrone v. Kelley, supra, at 69-70 and 72.

The California court's approach to the broker-finder issue is an enlightened one which recognizes and preserves the

important differences between the two and prevents those who bargain for and receive valuable finder's services from avoiding just payment for the same.

CONCLUSION

The mere finding and introduction of a buyer is not an activity or dealing which results in legal liabilities between the buyer and seller of realty and thus does not involve the dangers sought to be protected against by the Utah Real Estate Brokers Act; therefore, public policy does not require that appellant as a finder only be licensed in order to recover a commission in good faith contracted for, honestly earned and not otherwise disputed. The Act should not be read to include such activity or dealing, nor require such licensing.

DATED this 1st day of December, 1977.

Respectfully submitted,

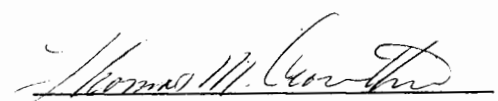
PARSONS & CROWTHER

By _____
THOMAS N. CROWTHER

By _____
DAVID L. STOTT

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Appellant's Brief to all of the named Defendants-Respondents by mailing the same to the office of Patterson, Phillips, Gridley & Echard, attorneys for Defendants-Respondents, 427 - 27th Street, Ogden, Utah 84401, placing each copy in a properly addressed, postage prepaid envelope and depositing said envelope in the United States mail this 15th day of December, 1977.



THOMAS N. CROWTHER