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Utah Supreme Court

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IN THE SUPREME COURT

OF THE STATE OF UTAH

DIVERSIFIED GENERAL CORPORATION, a Utah corporation, Plaintiff and Appellant, vs. WHITE BARN GOLF COURSE, INC., a Utah corporation, KEITH B. DOWNS, ALBERT SANONE, A O K LANDS, INC., 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 Judicial District Court for Weber County, State of Utah

THE HONORABLE RONALD O. HYDE, Presiding

RESPONDENTS' BRIEF

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FILED

JAN 13 1978

Clerk, Supreme Court, Utah

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Defendants and Respondents.	)	

RESPONDENTS' 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

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undertakes for a fee to secure a purchaser for a property belonging to another comes within the purview of the Real Estate Broker's Statute, 7A UCA §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

Respondent, White Barn, seeks an order affirming the decision of the lower court and the Summary Judgment.

STATEMENT OF 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 for a specified sales price. The agent of appellant, DGC, conceded that the purpose of the Agreement was to give me the opportunity to find a buyer that would result in a sale (Record at 30).

After the closing DGC agreed to the payment of its fee in installments, with a downpayment of $35,000.00 (designated as sales commission), which downpayment was paid and received by DGC (Record at 3 and 30).

However, White Barn refused 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

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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). It was after the present lawsuit was filed that White Barn discovered that DGC was not a licensed real estate broker or agent (Record at 35). 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 is do the real estate broker's statutes apply to one who acts under contract for a commission to find a buyer of real property?

POINT I

THE UTAH CASE LAW DOES NOT DISTINGUISH BETWEEN A REAL ESTATE BROKER OR SALESMAN, AND A FINDER.

The Utah case law holds unequivocally that a finder is within the real estate law. The pertinent parts of the applicable sections of the Utah Code Annotated, 1953, which are to be construed herein are set forth as follows hereafter and then

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placed in excerpt form with their applicable provisions:

> 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 UCA §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 UCA §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 UCA §61-2-18 (1953).
>
> IT SHALL BE UNLAWFUL FOR ANY...CORPORATION TO...ACT AS A REAL ESTATE BROKER OR REAL ESTATE SALESMAN WITHIN THIS STATE WITHOUT FIRST OBTAINING A LICENSE....
>
> 7A UCA §61-2-1 (1953).
>
> ...."REAL ESTATE BROKER"...SHALL INCLUDE ALL...CORPORATIONS ...WHO FOR ANOTHER AND FOR A FEE...ASSISTS OR DIRECTS IN THE PROCURING OF PROSPECTS...WHICH DOES OR IS CALCULATED TO RESULT IN THE SALE,...OF ANY REAL ESTATE. . . .
>
> 7A UCA §61-2-2 (1953).

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A. Andersen v. Johnson, 108, Utah 417, 160 P.2d 725 (1945), is not in point. It involves a case wherein one of the parties was a licensed real estate broker. The litigation involved the broker's contract with a third party to pay a fee for prospects brought to him for listing of real property. That case held that a real estate prospect referred to one interested in the purchase of realty.

Counsel relies strongly on Justice Wade's dissent in that case wherein Justice Wade excludes from the intent and purpose of the statute the casual or remote influence of a stenographer or other party. The case, nevertheless, does not exclude a finder for the purchase of real property from the provisions of the real estate law of the State of Utah.

B. Chase v. Morgan, 9 Utah 2d 125, 339 P.2d 1019 (1959), is the second case discussed by appellant's counsel.

Counsel disregards the specific and direct holding of the case, to-wit:

> . . .Appellant contends the court erred in concluding that he was precluded from recovery because he had not obtained a real estate broker's license because (1) the real estate broker's statutes do not apply to one who merely introduces a buyer to an owner; and (2) nor to transactions in the oil and gas business; and (3) because oil and gas leases are not real estate. We find no merit to any of these contentions. (Emphasis supplied)

Chase v. Morgan, supra, at 1020.

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That case specifically and clearly holds that there is no merit in the contention that the real estate broker's statutes do not apply to one who merely introduces a buyer to an owner.

Counsel makes great point of dictum by Justice Wade wherein it is stated in the opinion:

> ....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. . . .

<u>Chase v. Morgan</u>, <u>supra</u>, at 1021.

It is suggested that the reading of the whole decision forces the inescapable conclusion that the statement is simply an a fortiori argument. The additional elements added to introducing the buyer and seller make it follow with stronger reason that the activity fell within the real estate broker's statutes. The case does not say the additional elements are necessary to bringing a finder's contract within the statute.

C. All fine distinctions and strained reasoning being laid to one side, the Utah law says a corporation which "assists or directs in the procuring of prospects" calculated to result in a sale is a broker. The appellant corporation, DGC, falls within the prohibitions of the statute and should not be allowed a fee.

<u>POINT II</u>

THE UTAH LAW STATED ABOVE IS MORE RESTRICTIVE THAN THE CALIFORNIA LAW.

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Appellant's Brief relies upon the California statute and case law. A reading of the applicable statutes demonstrates the difference between Utah and California law of brokers.

The California law referred to in Section 10131 (a) of the Real Estate Regulations is a definition of a real estate broker:

> (a) Sells or offers to sell, buys or offers to buy, solicits prospective sellers or purchasers of, solicits or obtains listings of, or negotiates the purchase, sale, or exchange of real property.
>
> §10131 (a) Real Estate Regulations.

The Utah law in the Utah Code Annotated defines a broker differently:

> ...assists or directs in the procuring of prospects or the negotiation or closing of any transaction which does or is calculated to result in the sale, exchange, leasing or renting of any real estate. . . .
>
> UCA §61-2-2 (1953).

While the California law above stated does refer to soliciting prospective sellers or purchasers, the Utah law is much more restrictive wherein it says "assists or directs in the procuring of prospects or the negotiation or closing..." The reading of the two statutes indicates that the applicable California case law construing the California statute is not of value as any authority to aid this court in the construing of the Utah statute. The California statute and the California case law allow for finders and finder's fees. The Utah case law and t . Utah statutes do not.

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POINT III

OTHER STATES HAVE REPUDIATED THE CALIFORNIA POSITION WITH RESPECT TO ALLOWING FINDERS OUTSIDE OF THE BROKERAGE LAWS.

Although counsel refers to California's approach as "an enlightened one", that view has long since been discounted and disallowed in other states. As early as 1931 in the Washington case of Grammer v. Skagit Valley Lumber Co., 162 Washington, 677, 299 Pacific Reporter 376, the Supreme Court listened to and repudiated all of the arguments proposed by counsel in this case. In determining if the salesman in that case was acting as a broker, or could avoid the consequences of the broker law by being a finder, the court held the finder-broker distinction did not lie and the activities covered in the case were that of a broker. The court quoted the case of Baird v. Krancer, 138 Misc. Rep. 360, 246 N.Y.S. 85, 87 and said:

> * * *"The court is constrained from the evidence in the case submitted by the plaintiff to arrive at the conclusion that this was an action for real estate brokerage as contemplated by section 440 of the Real Property Law * * *and it was clearly the intent of the Legislature to protect dealers in real estate from un-licensed persons who acted as brokers that the statute was enacted. *To interpret the statute so as to permit men under the guise of an alleged introduction to evade section 440 would simply nullify the statute and would expose the public by judicial interpretation to the very evils that the Legislature and the reputable brokers of the state sought to protect it from.* * * * If real estate is going to be the principal element involved in the transaction, a broker has to have a license and cannot evade its necessity by referring to the services as originating or introducing or any other fantastic term. A

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statute enacted for the protection of the public must be interpreted fairly to effect the purposes of its enactment. It is not to be rendered ineffectual by a strained construction.

The essential feature of a broker's employment is to bring the parties together in an amicable frame of mind, with an attitude toward each other and toward the transaction in hand which permits their working out the terms of their agreement. They may reach that agreement without his aid or interference. Indeed, in a transaction of any magnitude, the terms would never be settled beforehand or negotiated finally by the broker. Each party would always wait until in direct contact with the other side in order that he might drive the best bargain possible. The broker would have no opportunity to induce one party or the other to agree upon some or all of the terms and would not be expected to do so. He would be entitled to his commission if the parties agreed upon terms originally proposed by one or the other, or agreed between themselves after the introduction.

This does not mean that the broker has not negotiated the transaction. He does that when he builds up in the minds of the parties a desire to do the business. He never cares what the terms are, so long as the agreement occurs. If the statute does not apply to such a situation, then it is a toothless enactment. Every unlicensed broker will make the same argument that the plaintiff here has made, that he did not have to bring the parties to actual agreement upon all the details, that that phase was something for the parties themselves to determine. *In short, every un-licensed broker will be enabled to carry on his business just as he did before the statute came into existence, simply by calling himself a finder, an originator, an introducer, instead of a broker. This would be an absurd limitation of the statute and one unfounded in reason or policy.* A broker 'negotiates' just as much when he brings parties together in such frame of mind that they can by themselves evolve a plan of procedure, as when he himself carries on the discussion and personally induces an agreement to accept a specific provision. . . . (Emphasis supplied).

CONCLUSION

In conclusion, the case is best summarized by two quotes from Judge Ronald O. Hyde's Memorandum Decision. Judge Hyde

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quoted Andersen v. Johnson, supra:

"The primary purpose of real estate business is to sell real estate or its use and from such transactions receive a fee or commission...

Judge Hyde said:

"I hold directly that: One who undertakes, on a commission or fee basis to secure a purchaser for property belonging to another is within the Real Estate Broker's Statute and must be licensed. * * * Defendants' Motion for Summary Judgment is granted. . . .

The appellant was aware of the above facts and that is why it designated the $35,000 payment received from respondents as a "sales commission" and not a finder's fee.

The decision of the trial court should be affirmed.

DATED this 13th day of January, 1978.

RESPECTFULLY SUBMITTED,

ROBERT V. PHILLIPS
Attorney for Respondents

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