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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 : Reply Brief

Utah Supreme Court

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FORMATED,
JOHN DOES

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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APPELLANT'S REPLY BRIEF

ARGUMENT

Pursuant to the provisions of the Utah Rules of Civil Procedure, Appellant replies to Respondents' Brief as follows:

POINT I

RESPONDENTS' CONCLUSION THAT THERE IS NO BROKER-FINDER DISTINCTION IN UTAH COMES AS A RESULT OF RESPONDENTS' FAILURE TO RECOGNIZE THE INTERACTION OF IMPORTANT PUBLIC POLICIES.

In their Brief, Respondents attempt to persuade the Court that the principal Utah cases bearing on the broker-finder issues namely, Anderson v. Johnson, 108 Utah 417, 160 P.2d 725 (1945), and Chase v. Morgan, 9 Utah 2d 125, 339 P.2d 1019 (1959), do not establish or recognize a broker-finder distinction, and that the Washington courts have rejected California's longstanding recognition of that distinction. The reasoning of Respondents in support of those propositions suggests a failure to discern both of the important public policies viewed by this Court and others in resolving such cases. Once the interplay of these policies is understood and seen as the backdrop to the decisions in these cases, it becomes clear that the finder-broker distinct exists in all three states mentioned and it also becomes possible to spot the crucial facts which have caused the courts to decide that the broker-finder distinction does or does not apply in a given case.

In each case cited by both Appellants and Respondents, there is this basic factual similarity: The first party renders a valuable "finding" service to the second party for which, by agreement, compensation is to be paid, but for which the second party refuses to pay because of a licensing statute which, the second party argues, requires the first party to be licensed before rendering such service and collecting a fee or commission.

In each such case, therefore, the Court is faced with two competing policy considerations: First, the policy of enforcing licensing statutes enacted to protect the public, and second, the policy of enforcing valid contractual obligations. The question then is what test does the Court use to determine preference for one or the other policy. This Court has stated that "in the absence of compelling considerations of policy to the contrary, it is the duty of the Court to give effect to the covenants which the parties have agreed to in their contract." Lundstrom v. Radio Corporation of America, 17 Ut 2d 114, 405 P.2d 339. This means that in cases like the one at bar involving a "finder", the court will enforce the contract unless the policy of enforcing the broker's statutes is compelling. The resolution of such cases, therefore, boils down to a determination of when the policy of enforcing the broker's statutes is compelling.

The cases cited by both Appellant and Respondent establish clearly that enforcement of the broker's statutes is compelling only where the party rendering the "finder's" service has had the authority to do more, or has actually done more, than find and introduce; conversely, where such party has done nothing more than find and introduce and has not had authority to do any more than that, the courts have allowed recovery on the basis that the demands of the broker's statutes were not compelling and thus

contract policy considerations prevail.

The reasoning implicit in the foregoing test is that where the party is truly a "finder" only, his influence is so remote and the potential danger to the public so small that the need for enforcing the licensing statute is not compelling and the policy of enforcing valid contracts, therefore, prevails. Such reasoning is sound and yields justice. An even casual reading of the licensing requirements of the broker's statutes makes it clear that they are designed to secure the competence and charact of those who earn a fee or commission for representing and negotiating for the parties in oftentimes complicated real estate transactions. Clearly one who does no more than find and introduce such parties need have no expertise in financial or real estate matters and the opportunity for dishonest dealing will seldom, if ever, present itself. Rather, it is where one furnish analysis, discusses and negotiates terms and counsels the parties on methods of transacting the sale, arranges the financing and documentation, and uses the skills of salesmanship to convince the parties to consummate the deal, or where the party is authorized to do any of the foregoing, that his competence and character must be assured. The broker's statutes were designed to give such assurances, but not to work unjust enrichment where such assurance is unnecessary. The broker's statutes restrict

the freedom of the State's citizens to transact business with one another and should not, therefore, be extended beyond that coverage necessary to afford the protection for which they were designed; to do so is to cause citizens to lose respect for the law and the courts and to nullify the good intentions of the legislature.

In Andersen, the court granted recovery to the appellant and specifically stated that he could not reasonably be viewed as having participated in the negotiation of the transaction. Supra, at 729. The real importance of Andersen, however, is the concurring opinion of Justice Wade in which he carefully points out why the policy of enforcing the broker's statutes is not compelling in that case:

> A reading of the statutes regulating real estate brokers makes it apparent that 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.

In Chase, the second major Utah case in which Justice Wade writes for the majority and in harmony with his prior opinion in Andersen, the Court found that the appellant had been authorized to do more than merely find and introduce: the appellant in Chase was given authority by his principal to actually sell or negotiate the sale of the leases involved.

> 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.

Respondents in the case at bar have tried to minimize the clarity of the foregoing language of the court in Chase with the assertion that the authority of negotiation and sale held by appellant in Chase was simply an additional ground for bringing appellant within the ambit of the statute. However, a reading of the plain language of Chase makes that contention untenable.

Respondents also seize upon the following language from Chase in an attempt to escape the clear meaning of the case:

> 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 added).

Chase v. Morgan, supra at 1020.

Respondent insists that the foregoing passage demonstrates the court's rejection of the broker-finder distinction; however, Respondent's interpretation cannot be made to square with Chase as a whole nor with Justice Wade's comments in Andersen. The obvious reason why the court found no merit in appellant's first contention is because appellant was authorized to do more than find and introduce a buyer. To restate the test: if one does not have authority to do any more than find and introduce and does not actually do more than that, enforcement of the broker's statutes is not compelling and the policy of enforcing valid contracts is favored. On the other hand, where a party has authority to negotiate or sell, i.e. do more than find and introduce, or where the party actually does negotiate or sell, the policy of enforcing the broker's statutes is compelling and must prevail.

This test is precisely that which has been long espoused by the California courts:

> 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. (emphasis added)

Tyrone v. Kelley, 106 Cal. Rptr. 761, 507 P.2d 65, at 72 (1973).

POINT II

THE PLAIN LANGUAGE OF THE UTAH AND CALIFORNIA BROKER'S STATUTES REPUDIATES RESPONDENTS' ARGUMENT THAT THERE ARE RELEVANT AND CRUCIAL DISTINCTIONS BETWEEN THEM.

Respondents attempt to lessen the cogency of the California cases by asserting incredibly that there is a substantial differe between the California and Utah broker's statutes. Appellant submits that the language of the respective statutes speak plainly for the conclusion that the statutes are in effect virtually identical (see page 7 of Respondent's Brief).

POINT III

THE CASE WHICH RESPONDENTS RELY ON SO HEAVILY ACTUALLY CORROBORATES THE POSITION TAKEN BY APPELLANT.

As final support for its position, Appellant would draw the Court's attention to the very case which Respondents so emphatically point to in support of their position; namely, the Washington case of Grammer v. Skagit Valley Lumber Co., 162 Washington 677, p.376 (1931). With this case Respondents wish to convince the Court that the other states have repudiated the California rule that finders are an exception to the broker's statutes. (It is remarked that Respondents directly admit that California allows for finders and finder's fees. "The California statute and the California case law allow for finder's fees." Page 7 of Respondents' Brief.

In citing the Grammer case, counsel for Respondents writes as follows:

> The Supreme Court (in Grammer) 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.

Respondents' Brief, page 8.

Counsel is partially right and partially wrong. Counsel is right in stating that the court held that the finder-broker distinction did not lie in Grammer and that the activities of the appellant were that of a broker, but counsel is wrong in assuming that the Washington court repudiated the same arguments

propounded by Appellant in the case at bar: the issue and principles of law are the same, but the activities of the appellant in Grammer and those of the Appellant in the case at bar were profoundly and significantly different. It is submitted that the Washington court would recognize the broker-finder distinctio in a proper case and counsel for Respondents admits that by implication in his statement. The appellant in Grammer, however, did not present such a case. The facts in that case, as found by the court, were that appellant had authorization to negotiate and obtain offers, i.e. actually offer the property for sale subject only to final approval by the defendant-owner; further, appellant actually prepared the seller's property for presentatio to prospective purchasers by compiling data and information, cruised the timber, prepared estimates of the costs of procuring, manufacturing and disposing of logs and lumber, obtained options on other timber and consummated the sale. In other words, the appellant was authorized to do and essentially did all that a broker does, being limited only by seller's right to subsequently approve or reject the sale. It is no wonder that the Washington court decried appellant's description of himself as a "finder" - he was no such thing.

It is apparent that the facts in Grammer are not the same nor even similar to those in the case at bar where Appellant was

contractually limited to doing and actually did no more than find potential buyers and refer or introduce them to the Respondents, who thereupon presented the property, negotiated all terms and offers, and consummated the sale.

CONCLUSION

The case law in Utah, California and Washington is harmonious and establishes the finder exception where the purported finder has neither done nor been authorized to do more than simply find and introduce.

In conclusion, Appellant urges the Court to consider the case law and the lack of compelling considerations for the application of the broker's statutes to Appellant, to be mindful of the great inequity and unjust enrichment which will result if Respondents are permitted to flaunt and evade their valid and otherwise binding contractual obligations, and to rule accordingly.

DATED this 29 day of March, 1978.

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 Reply 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 29th day of March, 1978.

Thomas N. Crowther