1978

Robert P. Morris et al v. John Price Associates, Inc. : Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT OF THE

STATE OF UTAH

ROBERT P. MORRIS and GUMP & AYERS REAL ESTATE, INC.,

Plaintiffs and Respondents,

vs.

JOHN PRICE ASSOCIATES, INC.,

Defendant and Appellant.

Case No. 15660

BRIEF OF RESPONDENTS

NATURE OF THE CASE

Respondents brought an action for breach of contract, to recover commissions due from appellant resulting from the lease of appellant's office building to IBM Corporation.

DISPOSITION IN THE LOWER COURT

This case was tried to a jury on December 12 and 13, 1977. The jury returned a verdict in favor of plaintiffs and damages were determined by the court, they being merely a matter of arithmetic computation. The court entered judgment on the verdict on December 20, 1977.

RELIEF SOUGHT ON APPEAL

The respondents ask the court to affirm the judgment of the trial court.

STATEMENT OF FACTS

Appellant John Price Associates, Inc., is engaged in the business of contracting, developing, and leasing real estate owned by itself or affiliates (R.267).

Respondent Robert P. Morris is a real estate salesman who was employed by Gump & Ayers Real Estate, Inc., from October of 1974 to October of 1976 (R.196). Respondent Gump & Ayers Real Estate, Inc., is a real estate broker (R.223). At all times pertinent to this case Morris had a contract with Gump & Ayers under which he received 60% of any commissions he generated and Gump & Ayers received 40% (R.224).

Mr. Morris in addition to his activities as a real estate salesman, had been, in 1972, attempting to commercially develop property which he owned (R.198). In connection with this attempted development, Morris became closely acquainted with representatives of IBM Corporation. In particular, Morris established business relationships with: Vern Swenson, IBM's head of real estate for the western United States (R.197); John Lind who was Mr. Swenson's assistant (R.197, 199); and Chuck Woodward who was sales manager for IBM's Salt Lake office (R.196). Mr. Swenson and Mr. Lind worked in the Los Angeles, California

IBM office (R.197). Although Morris' own land development did not come to fruition (R.198), he did become very familiar with the real estate and office space needs of IBM (R.199).

In the fall of 1974 Morris became aware that appellant's Meridian Park Office Building #2 would be available for leasing (R.200), and believed that the building would meet the needs of IBM (R.216, 217). On or about January 29, 1975, Morris called John Price, president of John Price Associates, Inc., and told him that he could get IBM as a tenant for the Meridian Park Development (R.201). Mr. Price, whom Morris had known for approximately 15 years (R.200), told Morris that if he would come down to appellant's offices, Mr. Price would direct Gary Machan, a vice-president of appellant, to provide Morris with a copy of the plans of the Meridian Park complex and a letter assuring Morris of a commission if IBM leased the building (R.201).

Morris proceeded to appellant's offices on the afternoon of January 29, 1975, and obtained the commission letter and set of plans (R.203). The commission letter, which was addressed to Morris, stated:

> This letter is to assure you that we will cover you on a 6% commission if a successful lease is negotiated with IBM on the second building of the Meridian Park Office Building.

The letter was signed by Gary Machan, vice-president of John Price Associates, Inc., in charge of real estate (R.204). Immediately after obtaining the above materials,

Morris flew to Los Angeles and on January 30, 1975, presented the plans and a letter describing the building complex to Mr. Swenson (R.205). Morris took Swenson to lunch and explained to Swenson that he believed the Meridian Park complex was the only one that would suit the needs of IBM, in Salt Lake City (R.205, 206).

Up to January 30, 1975, no one at John Price Associates, Inc., was aware of the particular needs of IBM in Salt Lake City (R.287, 253, 254). However, both before and after the January 30th meeting, IBM was involved in a continuous search for new office space in Salt Lake City (R.308, 323), and Mr. Swenson testified that Morris was aware, from their conversations, of the needs of IBM in Salt Lake City (R.325, 326). Thus, Morris was able to match IBM's desire to lease a "shell space" structure with the fact that the Meridian Park building satisifed such a requirement (R.309, 216, 217).

In addition to the plans furnished to IBM at the January 30th meeting with Mr. Swenson, Morris also presented space estimates on the Meridian Park building. The estimates were based on Morris' phone conversation with John Price (R. 217, 282). Morris left the building plans with Mr. Swenson and flew back to Salt Lake City (R. 206). On February 4, 1975, John Lind, an assistant of Mr. Swenson, phoned Mr. Machan at John Price Associates, Inc. (R.362). The call came at the request of Mr. Swenson

and the purpose of the call, as evidenced by Lind's notes, was to obtain more information about the Meridian Park building (R.206).

After the meeting with Mr. Swenson in Los Angeles, Morris kept informed of the activities of IBM through his contact with Mr. Chuck Woodward, the sales manager for IBM in Salt Lake City (R.207, 209). Woodward was able to supply Morris with information since local IBM employees are involved in an advisory capacity in the search for new office space (R.329). Morris continued to state to Woodward the advantages of the Meridian Park complex (R.208).

Around September of 1975 John Lind was replaced by Ray Zimmerman (R.305, 306). Lind discussed IBM's need for office space in Salt Lake City with Zimmerman (R.355). Zimmerman saw the letter from Morris to Vern Swenson which also contained Lind's notes from his February 4, 1975, phone conversation with Machan of John Price Associates (R.312). Lind testified that IBM had more than a routine interest in the letter from Morris since the typical unsolicited letter received by IBM, relating to real estate opportunities, would be returned to the sender or a reply letter would be written. In this case neither of those procedures was followed by IBM (R.364, 365).

That same month Woodward, the IBM sales manager for Salt Lake, called the offices of the appellant and arranged for a meeting which took place later on the same

day between appellant and IBM (R.254, 255). After that point in time all negotiations leading to the signing of the lease agreement were handled by the real estate departments of IBM and John Price Associates, Inc. (R.238). In March of 1976 Mr. Morris learned through his IBM contacts that the lease would probably be signed (R.210). He called Machan and requested his commission, which request was refused and the resulting lawsuit ensued (R.210).

ARGUMENT

I.

THE JURY VERDICT SHOULD BE SUSTAINED SINCE NO SUBSTANTIAL OR PREJUDICIAL ERROR OCCURRED

Appellant in its Statements of Fact continues to argue facts that were resolved at trial. Such argument, however, is subject to the fundamental rule often reiterated by this court:

> This case falls within the framework of the fundamental principle: that what the parties are entitled to is a fair opportunity to present their respective cases to a court and jury for determination. When this has been accomplished, all presumptions favor the verity of the verdict and the judgment; and this includes all aspects of the conduct of the proceedings, and rulings of the court. The burden is upon appellant. . . to show not only that there was error, but that it was substantial and prejudicial . . . Redevelopment Agency of Salt Lake City v. Mitsui Investment Inc., 522 P.2d 1370, 1374 (Utah 1974) (footnotes omitted) (emphasis added).

Further, this court has clarified the above rule by stating that "where the evidence is in dispute it must be viewed in the light most favorable to the verdict. . ." Whyte v. Christensen, 550 P.2d 1289, 1291 (Utah 1976) (emphasis added). See also, Isaguirre v. Echevarria, 96 Idaho 641, 534 P.2d 471 (1975), where the Idaho Supreme Court in a real estate broker's commission case summarized the general rule that "[t]he findings of fact of a trial court will not be disturbed on appeal when based on substantial competent, though conflicting, evidence." Id. at 475 (emphasis added).

Proceeding under the guidance of the above rule it is only necessary to sketch the scenario that the jury found persuasive. Through his own, independent efforts Morris became closely associated with certain key personnel in IBM who were either directly or indirectly working on the office space needs of IBM (R.199), and matched those needs with the specifications of the building being erected by appellants (R.216, 217). Morris promptly communicated the above information to Vern Swenson, IBM's head of real estate for the western United States (R.197). Relying on the fact that Morris was fully knowledgeable of IBM's needs, Swenson instructed his assistant, John Lind, to call appellant and obtain further information (R.325, 326, 349, 362). The actions of Swenson and Lind were consistent with IBM's policy of constantly searching for new office space necessary to meet the company's anticipated growth (R.308, 323).

When Lind was replaced by Ray Zimmerman, Lind informed Zimmerman of IBM's needs in Salt Lake City and relayed the information on appellant's building (R.305, 306, 355). Thereafter, Zimmerman contacted appellant through Chuck Woodward, IBM sales manager for Salt Lake City (R.254, 255). Woodward, with whom Morris had remained in constant contact (R.207, 209), set up a meeting between Zimmerman and appellant which launched the negotiations between the parties eventually leading to the signing of the lease.

This reiteration of the facts clearly meets the above test which was succinctly stated by the Kansas Supreme Court in a broker's commission case: "[T]he appellate questic is whether there is any evidence to sustain a finding that the efforts of the real estate broker were the procuring cause of the sale." Holloway v. Forshee, 208 Kan. 258, 491 P.2d 556, 559 (1971) (emphasis added). Thus, if there were evidence to support the findings of fact in respondent's favor, there may be no further review of the facts, but only of the legal issues raised. Simon v. Electrospace Corp., 28 N.Y. 2d 136, 269 N.E.2d 21, 320 N.Y.S. 2d 225, 227 (1971).

II.

THE JURY CORRECTLY FOUND RESPONDENTS TO BE THE PROCURING CAUSE OF THE LEASE BETWEEN PRICE AND IBM BASED ON PROPER INSTRUCTIONS FROM THE TRIAL COURT

It is undisputable that in order for a real estate agent to receive his commission he must be the procuring cause

of the sale. In light of this rule of law, the trial court gave the following Instruction No. 11:

> To recover, plaintiffs must show by a preponderance that they were the procuring cause of the lease between IBM and defendant. To be the procuring cause of the lease, plaintiffs must have set a chain of events in motion that finally resulted in the lease. If the events caused by the plaintiffs' acts came to nothing, and the lease was entered because of completely new and independent causes, then plaintiffs cannot recover. However, this does not mean that plaintiffs must have participated at every step of negotiations or even in most of them. Nor does it mean that plaintiffs were not the procuring cause if others would have set the same chain of events in motion had plaintiffs not done so.

The trial court's instruction properly defined the term "procuring cause" whether Morris is deemed to be a "finder" or a "broker." Therefore, the jury could properly find that Morris' activities satisfied the test of "procuring cause" under either theory.

Although there are no Utah cases on the distinction between a "finder" and a "broker" the distinction is quite narrow. In Pennsylvania, the courts have described the distinction as follows: "Such distinction as exists between these two terms is more a matter of trade usage than legal definition. In general, a finder is an independent actor whose role is that of a middleman who introduces the parties, supplies information to one or both about the other and is required to do little else. . ." Amerofina, Inc., v. U.S. Industries, Inc., 232 Pa. Super.Ct. 52, 325 A.2d 448, 451 (1975) (emphasis added); Minichiello v. Royal Business Funds Corp., 18 N.Y.2d 521, 223 N.E.2d 567, 277 N.Y.S.2d 268, 272

(1966) cert. denied 389 U.S. 820 (1967). The Pennsylvania court, in awarding the plaintiff his commissions, held that a finder must meet the test of procuring cause to earn his commission, but wrote "it is clear that a finder's fee is not dependent upon the finder's participation in negotiations and that it may become payable even though a third person brings the parties to an agreement." 325 A.2d at 453.

The Colorado Supreme Court has stated that a "finder" is entitled to his commission if he "is the one who sets the chain of events in motion which results in the sale." Consolidated Oil & Gas, Inc. v. Roberts, 162 Col. 149, 425 P.2d 282, 286 (1967) and in Bittner v. American Marietta Co., 162 F.Supp. 486, 488 (E.D. Ill. 1958), the Illinois district court held "[a]ll the 'finder' is required to do is to bring the seller to the attention of the purchaser." In New York, the Court of Appeals has held that: "It is possible for a finder to accomplish his services by making only two phone calls and, if the parties later conclude a deal, he is entitled to his commission." Minichiello v. Royal Business Funds Corp., 18 N.Y. 2d 521, 223 N.E.2d 793, 277 N.Y.S.2d 268, 272 (1966) cert. denied 389 U.S. 820 (1967) (emphasis added). See also, Freeman v. Jergins, 125 Cal. App. 2d 536, 271 P.2d 210, 219-220 (Dist. Ct. App. 1954).

Clearly, Morris' activities passed all these standards and Instruction No. 11 embodies the Colorado

Supreme Court's test which is actually stricter than the other standards.

The trial court's instruction on procuring cause also covered the possibility that respondent was acting in the capacity of a "broker." Appellant contends that the facts do not support a finding that Mr. Morris fulfilled the obligations of a broker and that the jury instruction on procuring cause for a broker was prejudicial to appellant. It has been demonstrated, however, that Morris' actions clearly were the basis for the lease between IBM and appellant. An examination of the test for procuring cause for brokers will show that Instruction No. 11 and the actions of Morris, both meet the test.

Appellant cites Brooks v. Geo. Q. Cannon Ass'n, 53 Utah 304, 1978 P. 589 (1919) and states that it is very similar to the case at bar. Actually the facts of that case are drastically different than the present appeal. The Utah Supreme Court in Brooks stated:

> After a careful perusal of the entire transcript of the testimony in this case, we are convinced there is not one scintilla of evidence tending to show that the plaintiff was the procuring cause in obtaining the loan for the defendant. . . nor was she in the slightest degree instrumental in bringing about the results finally obtained. . . The testimony is clear and uncontradicted that the only effort made by the [agent]. . . was that she. . . communicated with either the Chicago or New York branch office of the Travelers' Insurance Company . . . Had either of these offices referred their communications to either the general office at Hartford or the local agency at Salt Lake

> city, the plaintiff's claim of having procured the loan might be contended for with some degree of consistency. . . Absolutely nothing resulted from plaintiff's inefficient efforts and attempt to procure the loan, as we view the record. Id. at 591 (emphasis added).

Clearly, the court was justified in reversing the jury verdict in Brooks where the plaintiff could not produce "one scintilla of evidence" to support her claim under the procuring cause test, but it is equally as clear that in the case at bar, respondents' actions were the only logical explanation of how the lease was procured. Appellant continues on Page 12 of its brief, to advance unsubstantiated theories of how the lease might have been procured. Appellant speculates that employees of John Price may have contacted IBM, or an unsolicited mailing may have attracted the attention of IBM, or Mr. Zimmerman may have discovered the Meridian Park building through an "independent effort." However, Price failed to advance any evidence substantiating these theories and the jury chose not to believe such speculation, but rather the plausible explanation advanced by Morris.

Other cases cited by appellant are also distinguishable from the present one. In Hampton Park Corp. v. T. D. Burgess Co., Inc., 270 Md. 269, 311 A.2d 35 (1973), the broker's contract required that the land be sold by the broker and thus the broker had to participate in negotiations in that case. Id. at 423. In Reed v. Taylor, 78 Wyo. 216, 322 P.2d 147 (1958) and Link v. Patrick, 367 P.2d 157 (Alaska 1961) the efforts of one broker were superceded by the efforts of

another broker and thus the former broker could not be the procuring cause of the sale. Appellant cites the case of Sumsion v. Streator-Smith, Inc., 103 Utah 44, 132 P.2d 680 (1943), where Justice Wolfe stated an evidentiary rule applicable in proximate cause-negligence cases. Even if such a standard were held applicable to the case at bar, the evidence clearly shows that the actions of Morris and the ensuing activities of IBM were not "conjecture" and Price failed to prove any "equal or more potent" probabilities. Id. at 683.

In contrast to the inapposite examples cited by appellant is the clear holding of the Utah Supreme Court in Fredrick May & Co. v. Dunn, 13 Utah 2d 40, 368 P.2d 266 (1962). The court stated:

> [T]he extent to which the broker's efforts must induce the sale depends on the terms used in the contract and the understanding and intention of the parties in making such agreement and the facts and circumstances of the case. Usually, whether the broker first approaches, or brings to the attention of the buyer that the property is for sale, or brings the buyer into the picture, has considerable weight in determining whether the buyer is the procuring cause of the sale. The fact that the sale was consumated without participation by the broker in the final negotiation does not preclude him from recovering his commission if the sale was otherwise procured by him. Id. at 269 (footnotes omitted) (emphasis added).

See also, Isaguirre v. Echevarria, 96 Idaho 641, 534 P.2d 471, 475 (1975).

Expanding upon the general rule stated above, the Kansas Supreme Court held "[w]here a real estate agent

is employed to find a purchaser ready, able, and willing to buy on terms acceptable to the seller, it is not required, in order to earn his commission, that he bring the parties together personally or introduce them, nor is it the law that, in order to earn his commission, he must procure a binding contract signed by the purchaser." Holloway v. Forshee, 208 Kan. 258, 491 P.2d 556, 559 (1971) (emphasis in original). See also, Mueller v. Seefried, 54 Wash. 79, 345 P.2d 389, 391 (1959). Thus, contra to appellant's contention on Page 12 of its brief, it is not necessary that the agent deal with representatives who are formally "authorized" to procure the lease. The agent need only "bring to the attention of the buyer that the property is for sale." See Fredrick May & Co. v. Dunn, supra, 368 P.2d at 269.

The New Mexico Supreme Court has observed that "[t]o entitle a real estate broker to compensation, it is sufficient that a sale is effected through his agency as its procuring cause. . . although the broker does not negotiate and is not present at the sale." Wilson v. Sewell, 50 N.M. 121, 171 P.2d 647, 649 (1946) (emphasis added). Also, in Summers v. Freeman, 128 Cal. App. 2d 828, 276 P.2d 131 (Dist. Ct. App. 1954), the California court held: "Where a broker's employment agreement does not contemplate that he shall procure a customer on certain terms, he is not obliged to bring the minds of the principal and the customer to an

agreement. He earns his commission when he procures a customer on terms to be arranged with the principal." Id. at 134 (emphasis added). Both appellant and IBM had their own real estate departments (R.238), and as the evidence indicates they negotiated a complex lease. This, however, in no way negates the fact that Morris was instrumental in bringing the two parties together and beyond that, the letter agreement did not require Morris to procure a lessee on "certain terms."

Finally, appellant claims on Pages 12 and 13 of its brief that the 18-month period between Morris' presentation to Mr. Swenson and signing of the lease somehow undermines respondents' argument under the procuring cause test. At the outset it should be restated that the day after Morris received his commission letter from appellant, he traveled to Los Angeles and presented the pertinent information concerning the Meridian Park building to Mr. Swenson (R.205). Further, at a later date, Morris showed the outside of the building to Mr. Swenson when he was in Salt Lake City and Morris kept in constant contact with Mr. Woodward (R.206, 207, 209). When confronted with the issue of whether an elapse of time would cause a revocation of a broker's contract, the New Mexico Supreme Court stated: "[W]here a broker finds a purchaser at the seller's terms, while still employed, the reasonableness of the time which he has taken is immaterial." Erb. v. Hawks, 52 N.M. 166, 194 P.2d 266, 270 (1948) (citations omitted) (emphasis

added). See also, Equity Benefit Life Insurance Co. v. Trent, 566 P.2d 449, 454 (Okla. 1977). The New York Court of Appeals summed up a strikingly similar fact situation by stating:

> "Tracing a connection between plaintiff's introduction of the business and the termination of the entire transaction was for the jury's consideration. . ." Here there was a time lapse of about eighteen months between the first Robosonic's meeting and the reactivation of the deal by Toxin's call to the new president. Tracing a connection between the two is supported by the facts and the reasonable inferences to be drawn therefrom and is not to be rejected because of the intervening lapse of time.
>
> Enough has been stated to indicate that the evidence, albeit contradicted, also sufficed to establish a continuing connection between plaintiff's initial efforts and the merger that came about. The issue, therefore, on this score, is beyond review in this court. Simon v. Electrospace Corp., 28 N.Y.2d 136, 269 N.E. 2d 21, 320 N.Y.S.2d 225, 229 (1971) (emphasis added).

III.

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR SUMMARY JUDGMENT AGAINST ROBERT P. MORRIS ON THE GROUND THAT HE WAS AN IMPROPER PARTY TO THE ACTION

Appellant cites Utah Code Ann. §§ 61-2-2,-18 and argues that Robert P. Morris is not a proper party to the lawsuit. The evidence shows, however, that the agreement between Gump & Ayers, a registered real estate broker (R.223), and Mr. Morris, a real estate salesman (R.196), provided that Morris was to receive 60% of all commissions

he earned and Gump & Ayers was to receive 40% (R.224). For Gump & Ayers to prove their cause of action (for 40%), Morris is a necessary party to the lawsuit. (See Rule 19 and 20 of the U.R.C.P.) The Utah Supreme Court stated in Young v. Buchanan, 123 Utah 369, 259 P.2d 876, 878-79 (1953), "Rule 19(a) does not permit one having no relationship or interest whatsoever in the conflict between the warring parties to be drawn into the fray merely because the real party in interest, -- who is barred by statutory provision from prosecuting the action in his own name and right, -- is in need of such person to circumvent legislative mandate." (Emphasis added.) That obviously is not the case in the present appeal and the statute should not be construed to prohibit real and necessary parties in interest from being joined in a cause of action.

In addition, a favorable ruling for appellant on this issue seems meaningless since the trial would have proceeded in the same manner without Morris. The same testimony would have been received and there is no evidence the jury verdict would have been otherwise had Morris not been a named party.

CONCLUSION

The evidence clearly indicates that the commission earned by respondents was was justified and that Morris was the procuring cause of the lease. Morris spent more than three years

becoming acquainted with the needs of IBM and spent the same period cultivating personal relationships with employees of IBM. Particularly important was Morris' relationship with Mr. Vern Swenson, IBM's head of real estate for the western United States. Mr. Morris was able to quickly reach the one person who had responsibility for all of IBM's real estate matters in the Salt Lake area. Morris' perceptive matching of the needs of IBM with the attributes of the Price building provided the crucial link between appellant and IBM. Finally, the jury had the opportunity to consider all of the evidence and they found Morris' activity was the basis for the lease.

For the above reasons the verdict of the jury and the judgment of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that I mailed two (2) copies, postage prepaid, of the foregoing Brief of Respondents to counsel for Appellant, George A. Hunt of Snow, Christensen & Martineau, 700 Continental Bank Building, Salt Lake City, Utah 84101, this 16th day of June, 1978.