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

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.

Case No. 15660

JOHN PRICE ASSOCIATES, INC.,

Defendant and Appellant.

- - - - -

BRIEF OF APPELLANT

An Appeal from the Judgment of the Third
Judicial District Court of Salt Lake County,
The Honorable James S. Sawaya, Judge

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FILED

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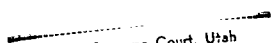

Clerk, Supreme Court, Utah

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JOHN PRICE ASSOCIATES, INC.,

Defendant and Appellant.

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BRIEF OF APPELLANT

NATURE OF THE CASE

This is a breach of contract action for recovery of a real estate commission arising out of the leasing of an office building by Defendant to IBM Corporation.

DISPOSITION IN LOWER COURT

This case was tried to a jury on December 12 and 13, 1977. The jury returned a verdict in favor of Plaintiffs. The issue of damages was not submitted to the jury, it being merely a matter of arithmetic computation for the court to perform. The court entered judgment on the verdict on December 20, 1977. Thereafter, post trial motions for Judgment NOV or New Trial were filed and argued. Those motions were denied.

RELIEF SOUGHT ON APPEAL

Defendant seeks a reversal of the Judgment entered below.

STATEMENT OF FACTS

Plaintiff Robert P. Morris is a real estate salesman who was employed by Plaintiff Gump and Ayers Real Estate, Inc. from late 1974 through August of 1975. (R. pp. 196, 224). Gump and Ayers Real Estate, Inc. is a real estate broker. (R. p. 223).

Defendant is engaged in the business of contracting and developing, and during 1975, also engaged in leasing certain properties owned by affiliate companies or by its president, John Price. (R. pp. 267, 268).

This action arises out of an alleged letter agreement dated January 29, 1975. (R. pp. 4, 203). Due to its brevity, the letter (Ex. P.-1) is set forth below in its entirety:

January 29, 1975

Mr. Rob Morris
Gump & Ayers
240 East 2100 South
Salt Lake City, Utah

Re: Meredian Park Office Building

Dear Rob:

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 Meredian Park Office Building.

Regards,

JOHN PRICE ASSOCIATES, INC.

/s/

G. L. Machan
Vice President,
Real Estate

GLM:ef

The Meredian Park office complex referred to in the letter was originally owned by a limited partnership known as Meredian Park Associates (R. p. 268). It was sold to a third party in the fall of 1976. (Id.). Prior to the sale, in July of 1976, a three year lease was signed between IBM Corporation and Meredian Park Associates. (R. p. 231; Ex. P-4). It is undisputed that all negotiations concerning this lease were performed by Defendant; Plaintiffs were not involved. (R. pp. 211, 247, 310, 312). The actual negotiations took 8 months and were tedious and complex. (R. pp. 247, 275).

The factual background adduced in this case indicates that Mr. Morris had been attempting to lease office space in Salt Lake City to IBM Corporation for several years, but to no avail. (R. pp. 197, 198). As a result of such attempts, Mr. Morris became acquainted with several employees of IBM, two of whom were in the real estate department. (R. pp. 196, 197).

In the fall of 1974, Mr. Morris became aware that the second building of the Meredian Park office complex was or would be available for lease (R. p. 200). Thereafter, and prior to the alleged commission letter being procured, Mr. Morris claims that he showed the building to Mr. Vern Swenson, then head of IBM's real estate department for the Western U.S. (R. p. 215). However, Mr. Swenson does not recall being shown the premises at all by Mr. Morris (R. p. 324).

In any event, on or about January 29, 1975, Mr. Morris telephoned John Price, Defendant's president, concerning the property. (R. p. 201). The evidence concerning the substance of that conversation is conflicting, but Mr. Morris claims he told Mr. Price of his contacts with IBM and that IBM was interested in leasing the second building of Meredian Park. (R. p. 201, 202). Mr. Morris also claims that Mr. Price directed him to stop by Defendant's offices and pick up a commission letter and a set of plans from Mr. Machan, Defendant's vice president. (Id.) Mr. Price denies authorizing the letter, claims it was procured by misrepresentation, and generally disagrees with the way things happened. (R. pp. 269-272). Nevertheless, Mr. Morris stopped by the offices of Defendant on or about January 29, 1975, and obtained the alleged commission letter and a set of plans to

the building. (R. p. 203). He also obtained a cover letter for the plans, which he signed. (R. p. 204; Ex. P-2). The cover letter was written on Defendant's stationery. (Ex. P-2). Defendant did not authorize Mr. Morris to write the letter on its stationery and Mr. Morris does not claim he was so authorized. (R. pp. 242, 246).

Mr. Morris testified that on or about January 29, 1975, he delivered to Mr. Vern Swenson of IBM in Los Angeles the cover letter and a set of plans to the second building of the Meredian Park office complex. (R. p. 205). Morris stated that he discussed the project over lunch with Mr. Swenson on that day. (R. p. 206). Morris further testified that he met with Mr. Swenson three to five weeks later in Salt Lake City and discussed the project briefly. (Id.) Mr. Morris recalled no further contact with Mr. Swenson or anyone from the real estate department of IBM. (R. p. 207). He did, however, state that he remained in contact with Mr. Chuck Woodward, local IBM typewriter salesman, through the fall of 1975 respecting the Meredian Park project. (Id.)

Mr. Morris admitted that he was not involved in the negotiation of the lease with IBM; that he did not know the terms of the lease, and; that he had no business contact whatsoever with Mr. Ray Zimmerman, the authorized IBM employee who commenced and ultimately consummated the lease

negotiations with Defendant. (R. pp. 211, 310, 311).

The evidence in the record is uncontroverted that Mr. Ray Zimmerman was the only employee of IBM who was authorized to negotiate a lease for space in the Salt Lake City area during the time period in question. (R. pp. 305-309, 329-330, 346-347). The only contact between Morris and Mr. Zimmerman was a brief conversation consisting entirely of "pleasantries." (R. p. 310). Mr. Zimmerman does recall seeing one letter from Morris to Vern Swenson in the IBM files which was footnoted by Mr. John Lind, another IBM employee. (R. pp. 312, 349). There was no testimony, however, from Mr. Zimmerman or any other person as to when he first saw that letter, whether or not he took any action as a result of seeing the letter or whether he had even read it. There is no testimony in the record from Mr. Zimmerman or anyone else as to whether he even saw a set of plans on the project priot to the time when he began negotiations with Defendant in late 1975.

Mr. Vern Swenson of IBM recalled that he had lunch with Mr. Morris in late January of 1975 in Los Angeles. (R. pp. 321, 322). He did not recall whether the Meridian Park office building was discussed or whether Morris left a letter and plans with him. (Id.) However, he did state that other projects were discussed at that time. (R. p. 325). He recalls seeing Morris sometime later in Salt Lake

City, but does not recall discussing Meredian Park. (Id.) Mr. Swenson was not involved in the lease negotiations between defendant and IBM. (R. p. 332). Further, he testified that local people, such as Mr. Chuck Woodward had no authority to act on behalf of IBM with respect to the acquisition of leased space or other real estate activities. (R. p. 329).

During the period of January 1975 through September of 1975 Mr. John Lind of IBM was the IBM employee charged with the conduct of its real estate operations in Utah. (R. pp. 346, 355). He testified unequivocally that during said period of time no one at IBM had any authority to negotiate for additional leased space in Salt Lake City, and furthermore, no decision had been made by IBM as to whether it even needed any additional space. (R. pp. 356, 358, 323, 306). At no time did Mr. Lind have any contact with Mr. Morris relative to the Meredian Park office complex. (R. p. 359).

There was no contact whatsoever between Plaintiffs and Defendant between January 29, 1975, and March 12, 1976--after the basic deal had been negotiated with IBM. Morris was unaware of any specific requirements IBM may have had and he did not know of any specifics relative to the project such as: actual available square footage, rent charge, available term, "fit-up" provisions, parking or ownership

of the property. (R. pp. 211, 212, 278-280). Moreover, he never made any attempt whatsoever to acquaint himself with these factors. (R. pp. 278-280). Morris had no contact whatsoever with any of the lease negotiations and he had no idea whether they were progressing along or whether they had even begun. (R. pp. 211, 212). Morris made no effort to follow-up on his initial contacts with Mr. Swenson or with any of the other IBM real estate personnel. (R. p. 295). Morris made no formal introduction of the two authorized principals involved and he had no knowledge of the lease terms to which each could agree. (R. pp. 278-280, 247).

ARGUMENT

POINT I

PLAINTIFFS DID NOT ADDUCE ANY EVIDENCE
WHATSOEVER TO PROVE THAT THEY WERE THE
"PROCURING CAUSE" OF THE LEASE WITH IBM.

Under Utah law, which follows the general rule regarding brokerage agreements, in order for a broker to recover a commission his efforts must have been the procuring cause which resulted in the closing of the transaction upon which his claim is predicated. In this case, it is essential for Plaintiffs to prove that they were the procuring cause of the lease with IBM since such performance is the only consideration to support the contract they seek to enforce.

In Brooks v. George Q. Cannon Assn., 178 Pac. 539

(Utah, 1919), the court considered a case very similar to the one at bar. Plaintiff Brooks had entered into an agreement with defendant to obtain a loan for defendant. Concurrently, one of defendant's directors was also seeking lenders to make the same loan to defendant. The evidence showed that prior to any loan being obtained by defendant, plaintiff and one LaBlonde had written to the Travelers Insurance Co. regarding a loan to defendant and had received a favorable reply to their letter. There was no significant follow-up to this letter, but later a loan was negotiated directly between defendant and Travelers. Plaintiff then claimed a commission on the loan. The case was tried to a jury and a judgment rendered for plaintiff. The Supreme Court reversed, finding no evidence to prove that plaintiff was the procuring cause of the loan. Of principal importance to the court's decision were facts to the effect that: (1) months had gone by between plaintiff's contact with Travelers and the date of closing; (2) the persons contacted by plaintiff at Travelers were not authorized to make the loan, and; (3) plaintiff had no part in negotiating the loan nor in supplying the necessary data and information whereby it was finally consummated. 178 Pac. at 591. In its ruling, the court stated the law as follows:

It is elementary in this class of cases that in order for a broker to recover commissions his efforts must have been the procuring cause which resulted in the closing of the transaction upon

which his claim is predicated. The rule is variously stated in the decisions of the courts and by the textwriters, but all are agreed that the efforts of the broker, in order to entitle him to a commission, must have been the efficient procuring or producing cause of the transaction relied upon by him. Id.

May other courts have reached the same conclusion as the Utah court using similar rationale. In Hampton Park Corp. v. T. D. Burgess Co., Inc., 270 Md. 269, 311 A.2d 35 (1973), the Maryland Supreme Court reversed a trial court ruling in favor of plaintiff and held, inter alia, that for a broker to earn his commission "the negotiations conducted by the broker must have progressed to a point where success seems imminent . . . and, it is not sufficient that the broker merely planted the seed from which the harvest was reaped." 311 A.2d at 423. A key factor in the ruling of the Maryland court in this case was that much of plaintiff's effort was directed toward employees of the eventual purchaser who had not been authorized to conduct the actual negotiations. Id. To the same effect see Walker v. David Davies, Inc., 34 Ohio App.2d 139, 296 N.E.2d 691, 693 (1973), where the appeals court overruled a jury verdict in favor of plaintiff on the grounds that plaintiffs' efforts were not the procuring cause of the sale because they were directed primarily toward a person who had no direct dealings in the final negotiation of the sale.

Another case in point in Link v. Patrick, 367 P.2d 157 (Alaska, 1961), wherein the Alaska Supreme Court reversed a

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lower court judgment for plaintiff-broker because plaintiff had failed to meet his burden of proving that he was the procuring cause of the sale. The court there noted that, at best, plaintiff had presented evidence from which it could be "inferred" that plaintiff could have been the procuring cause--such inference the court concluded did not meet the burden of proof. Id. at 158.

The Utah court is in full agreement with the evidentiary position of the Link case, supra. In Sumsion v. Streater-Smith, Inc., 103 Utah 44, 132 P.2d 680 (1943), Justice Wolfe, in this oft-cited case, held that:

While deductions may be based on probabilities, the evidence must do more than merely raise a conjecture or show a probability. Where there are probabilities the other way equally or more potent the deductions are mere guesses and the jury should not be permitted to speculate . . . The evidence must, however, do more than merely raise a conjecture or show a probability as to the cause of the injury, and no recovery can be had if the evidence leaves to conjecture which of two probable causes resulted in the injury, where defendant was liable for only one of them. 132 P.2d at 683.

See also, Olsen v. Warwood, 255 P.2d 725 (Utah, 1953); Bolt v. Davis, 70 N.M. 449, 374 P.2d 648 (1962).

From the foregoing case law, in order for Plaintiffs to sustain their burden on the issue of procuring cause they must show that:

- (1) They not only planted the seed which directly produced the harvest, but that they were involved in the transaction to a point where success seemed imminent;

- (2) Their dealings were with persons authorized to consummate the transaction;
- (3) The time lapse between their efforts and the closing was not unreasonably attenuated, and;
- (4) The transaction in fact resulted from their efforts--not just that it might have.

When the above criteria are applied to the facts of the instant case, Plaintiffs fail on each and every point. At best it might be said that Plaintiffs could possibly have planted a seed--their involvement ended there. At the time of their dealings with IBM success was at least a year away and IBM was neither interested in leasing nor authorized to do so. Plaintiffs had no business dealings whatsoever with any persons at IBM who were authorized to negotiate the lease. The time lapse between Plaintiffs' efforts and the closing was 18 months, during which time Mr. Morris' only contact was with Mr. Woodward, the local typewriter man. During this extended period Morris did nothing whatever to follow-up. Finally the evidence shows that the procuring cause of the lease could have been a number of different things. It could have been a result of a mailing by Defendant. (R. p. 273). It could have been a result of the independent efforts of Mr. Zimmerman. (R. p. 308). It could have been as a result of a later contact by Defendant. (R. p. 274). The evidence is equally susceptible to inferences supporting any of the foregoing "procuring

causes," any of which after the 18-month lapse is more probable than the one the Plaintiffs claim. In addition, by delivering the plans with a cover letter on Defendant's stationery, Mr. Morris attempted to convey the impression that he was an employee of Defendant, thereby voluntarily removing himself from any further contact or involvement.

In the final analysis the fact remains that Plaintiffs produced no affirmative evidence to prove that they were the procuring cause of the lease with IBM. A contrary finding is simply unsupported by any substantial, credible and legally sufficient evidence.

POINT II

INSTRUCTION NO. 11 GIVEN BY THE COURT IMPROPERLY STATES THE LAW OF "PROCURING CAUSE" AND IS CLEARLY PREJUDICIAL TO DEFENDANT.

Instruction No. 11 given by the court in this case reads as follows:

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. (Emphasis added.)

This instruction conveys the clear impression that to be the procuring cause in this transaction all Plaintiffs had to do was start the ball rolling--no matter if someone else had to push it to its destination. This is not what procuring cause means.

In Reed v. Taylor, 322 P.2d 147 (Wyo., 1958), the Wyoming court had occasion to interpret and analyze the definition of procuring cause as set forth in the Utah case of Brooks v. George Q. Cannon Assn., supra, and others. The Wyoming court held that where more than one party is seeking to procure a sale or lease for a seller (as is the case here) the sale must arise from the foundation laid by the broker in order to entitle him to a commission. The court there stated that:

The mere introduction of a prospect to an owner or even the broker's participation in unsuccessful negotiations between the parties does not earn the broker a commission In such a case the introduction of a prospect is merely one step in providing the foundation from which the broker may develop a sale. 322 P.2d at 150.

The court went on to further indicate that the key test is that the procuring broker is the one who causes a meeting of the minds between the principals. Id. at 150. See also Hampton Park Corp. v. T. D. Burgess Co., Inc., supra.

The case law on procuring cause clearly requires something more than merely setting a chain of events in motion.

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It requires that the broker's efforts cause minds to meet, for success to be imminent and that the chain of events move continually forward as a direct result of the broker's efforts. Such is not the case here.

Instruction No. 11 given by the court led the jury to the conclusion that all Plaintiffs had to do was introduce the parties and the commission was earned. That is not the law and the jury was improperly instructed.

The requirement that Plaintiffs be the procuring cause of the lease is the only consideration to support the contract alleged by them. Given the substantial nature of the commission claimed, in this case and others, to be a procuring cause requires effort. The broker must cause a meeting of the minds, success must be imminent, he must be dealing with authorized people and he must do this all within a reasonable period of time. Here, the efforts of Plaintiffs do not amount to a peppercorn because there is no causal relationship between what they did and the lease which was finally negotiated.

POINT III

ROBERT P. MORRIS IS AN IMPROPER PARTY TO
THIS ACTION.

On March 17, 1977, Defendant filed a Motion for Summary Judgment in this action seeking to have the action dismissed as to Plaintiff Robert P. Morris. (R. p. 29). The grounds for such motion were set forth in the supporting memorandum

filed therewith. (R. pp. 31, 32). Said motion was denied by the lower court. (R. p. 34). Denial of said motion was improper and constitutes error in this case.

Robert P. Morris is a real estate salesman, who was employed by Plaintiff Gump & Ayers Real Estate, Inc., a real estate broker. It has been established by request for admission that Robert P. Morris is not now nor has he ever been a real estate broker licensed under the laws of Utah. (R. p. 23).

Utah Code Annotated § 61-2-18 (1953) provides as follows:

(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.

(b) No real estate salesman shall have the right to institute suit in his own name for the recovery of a fee, commission or compensation for services as real estate salesman except where the action is against the broker but any such action shall be instituted and brought by the broker with whom the salesman is connected.

Section 61-2-2, Utah Code Annotated (1953), defines the leasing of real property as being an act which must be performed by a licensed real estate broker in order to be legal. It has been admitted in this case that Robert P. Morris is

not a licensed real estate broker. Accordingly, Robert P. Morris is not a proper party to the instant lawsuit. The statute in question (§61-2-18) speaks in no uncertain terms: it provides that a real estate salesman shall not directly bring an action for collection of a commission. Defendant submits in view of this statute and the admitted facts in this lawsuit, the lower court erred in failing to grant the Summary Judgment requested.

Such error is particularly prejudicial to Defendant because Mr. Morris terminated his employment with Gump & Ayers Real Estate, Inc., (the broker), prior to the time the lease was consummated with IBM. (R. p. 224). Thus, absent some evidence of assignment of the contract rights either to another broker or from Morris back to Gump & Ayers Real Estate, Inc., the record does not disclose who owns the claim. There is no evidence of an assignment in this case, consequently it may well be that whoever owns the claim has no right to bring suit on it.

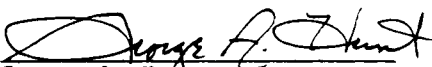
CONCLUSION

Plaintiffs failed to prove that they were the procuring cause of the lease with IBM. At best, Plaintiffs' evidence required the jury to engage in rank speculation to reach its verdict. Furthermore, the jury was hastened to its insupportable verdict by Instruction No. 11 which imparts the distinct impression that a mere introduction of

the parties is sufficient consideration to support the contract and satisfy the requirement of procuring cause. Finally, Robert P. Morris is an improper party to this action.

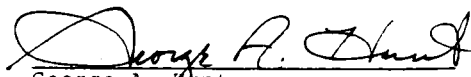
The Judgment of the lower court should be reversed.

SNOW, CHRISTENSEN & MARTINEAU

By 
George A. Hunt
Attorneys for Appellant
John Price Associates,
Inc.

CERTIFICATE OF SERVICE

I hereby certify that I personally delivered two (2) copies of the foregoing Brief of Appellant to counsel for Respondents this 27th day of April, 1978.


George A. Hunt