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Robert P. Morris et al v. John Price Associates, Inc. : Reply 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,

Case No. 15660

vs.

JOHN PRICE ASSOCIATES,
INC.,

Defendant and
Appellant.

REPLY 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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REPLY BRIEF OF APPELLANT

INTRODUCTION

The nature of the case and disposition in the lower court are thoroughly discussed in Appellant's initial brief, and will not be repeated here. For convenience, references to the Respondents' brief will be shown as (R's brief), and the Transcript of Trial as (Tr.).

ARGUMENT

POINT I

THE "PROCURING CAUSE" STANDARD IS DIFFER-
ENT FOR "BROKERS" THAN FOR "FINDERS".

There are no Utah cases recognizing recovery based upon
a claim for a finder's fee, as opposed to a broker's fee.

Plaintiffs argue that "the distinction is quite narrow" (R's brief 9), and that the trial court's instruction number 11 "properly defined the term 'procuring cause' whether Morris is deemed to be a 'finder' or a 'broker'" (R's brief 9). While recovery for either a broker or a finder requires the test of procuring cause, there is a significant difference in the type of performance required.

It should first be noted that nearly all of the cases dealing with finders are set in the context of "business opportunity finders", or in specialized fields such as speculative oil and gas leases. Finders are generally not regulated or licensed by the states, while real estate brokers are universally so regulated.

Plaintiffs cite several cases in their brief at pp. 9-10, setting forth the standard for finders, none of which deal with real estate sales or leasing transactions. (Amerofina-business merger opportunity; Minichiello-stock investment opportunity; Bittner-business purchase opportunity; Freeman-stock investment opportunity; Consolidated Oil-oil and gas lease). They argue that the standard for finders in those cases requires only an introduction of the parties, and setting "the chain of event in motion which results in the sale". (R's brief 10, citing Consolidated Oil & Gas, Inc. v. Roberts, 425 P.2d 282 (Colo. 1967)).

In direct contrast with the Consolidated Oil finder's standard is the broker's standard, set forth in Midwest Realty Co. v. Allied Supermarkets, Inc., 341 F.Supp. 1008 (E.D. Mo. 1972):

A broker is not entitled to recover a commission if his acts were merely one of a chain of causes producing a sale or contributing in some degree thereto unless his acts constituted the efficient and procuring cause thereof. Id. at 1012-13.

The Consolidated Oil case itself points out the distinction between oil and gas finders and real estate brokers:

The custom and usage in the oil and gas industry in regard to brokers and finders are spelled out in great detail by this record. The usual type of broker's commission case in the regulated real estate business in Colorado, as is urged by the defendant, is not necessarily in point here. ...

The law is that the right of a broker to recover a commission is dependent upon the terms of the agreement and the performance expected of him. (Citations omitted). The measure of performance of an oil and gas broker or finder would seem to require only that he present a property available for acquisition and then procure any requested information needed to evaluate the property. His compensation is dependent upon the subsequent purchase, but not upon his efforts toward accomplishing the purchase. 425 P.2d at 286-87. (Emphasis added).

Thus, the standard for a real estate broker requires more than just setting the chain of events in motion. As stated in Reed v. Taylor, 322 P.2d 147 (Wyo. 1958):

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. Id. at 150.

The Utah case of Brooks v. Geo. Q. Cannon Assn., 53 Utah 304, 178 P. 589 (1919), discussed at length in Appellant's initial brief, may have come closer to a fact situation appropriate for a finder's standard, as it involved a loan broker rather than a real estate broker. Nevertheless, the Utah court stated that the procuring cause standard required the broker to be the "efficient procuring or producing cause of the transaction relied upon by him". The efforts of the broker in Brooks, while quite similar to those of the plaintiff Morris, were held insufficient to entitle him to a commission.

Plaintiffs erroneously cite the Utah case of Frederick May & Co. v. Dunn, 13 Utah 2d 40, 368 P.2d 266 (1962), for the proposition that "The agent need only 'bring to the attention of the buyer that the property is for sale'" (R's brief 14). Actually, the Frederick May case held that the broker had not met the procuring cause standard, and that a directed verdict for the seller against the broker seeking a commission was proper. Although the purchaser (S&H) became aware of the subject property through the broker (May),

"[a]ll of the negotiations between them were on the basis that S&H was only a prospective financial backer of another person who was interested in making the purchase". 368 P.2d at 269. Thus, plaintiffs' reliance on the "bring to the attention of the buyer" language is misplaced, and more is required to meet the procuring cause requirement in Utah.

Illustrative of the distinction between finders and brokers is the case of Bittner v. American-Marietta Co., 162 F.Supp. 486 (E.D.Ill. 1958). Plaintiffs rely on this case for the proposition that "[a]ll the 'finder' is required to do is bring the seller to the attention of the purchaser". (R's brief 10). Plaintiffs neglect to include language from the same page of that decision which points out the distinction between finders and brokers:

A mere "finder" would not constitute a broker.
There is no reliance upon the "finder" to perform the duties of the broker in negotiating the contract.

In New York the distinction between a "finder" and a "broker" has been recognized. In Kuffler v. List, D.C.S.D.N.Y., 144 F.Supp. 776, 778, the court held that there was a "difference between finding a business for others to do and acting as a broker in doing the business". 162 F.Supp. at 488. (Emphasis added).

In Utah, to be a procuring cause required more than being a finder in the business opportunity sense--more than "setting the chain of events in motion". It requires being

the cause of a meeting of the minds--being the efficient procuring cause of the transaction.

POINT II

INSTRUCTION 11 STATES THE STANDARD FOR A
FINDER, NOT A BROKER.

As discussed above, while a finder's test of procuring cause may be satisfied by less, a broker must be more than "merely one of a chain of causes". Midwest Realty, supra. Further, "the negotiations conducted by the broker must have progressed to a point where success seems imminent". Hampton Park Corp. v. T. D. Burgess Co., Inc., 311 A.2d 35, 42 (Md. 1973). This case goes on to state:

In the final analysis, the broker must establish that he is the primary, proximate and procuring cause of the sale, (citation omitted); and it is not sufficient that the broker has merely "planted the seed from which the harvest was reaped". (Emphasis added). 311 A.2d at 42.

Plaintiffs admit in their "Memorandum in Opposition to Motion for Judgment N.O.V. or New Trial" that "instruction 11 correctly states the law of procuring cause as it applies to finders". (Memorandum at 6). Plaintiffs now contend that instruction 11 "properly defined the term 'procuring cause' whether Morris is deemed to be a 'finder' or a 'broker'". (R's brief 9). However, in light of the above discussion regarding the distinction between the procuring cause standard of brokers and finders, it is clear that the

language of instruction 11 ("plaintiffs must have set a chain of events in motion that finally resulted in the lease. ... [T]his does not mean that plaintiffs must have participated at every step of negotiations or even in most of them," etc.) is, as plaintiffs originally contended, the standard for finders. It conveys the clear impression that plaintiff need only start the ball rolling, i.e., introduce the parties, and do nothing further.

To uphold such a finder's standard in the instant case would be devastating precedent. If a real estate broker could recover for "only two phone calls" (R's brief 10), in a fact setting such as the instant one, no one would dare talk with such a person. Every introduction or suggestion by a broker could bind a seller to a commission. As in the instant case, the broker could sit back while doing nothing for 18 months or more, and then claim a commission for the earlier introduction.

Pass v. Industrial Asphalt of Cal., Inc., 239 Cal.App.2d 776, 49 Cal.R. 190 (1966) involved a claimed finder's fee for introducing the seller of a business to a prospective purchaser who later purchased a different business from the same seller. Therein, the court reversed a judgment for the finder, stating:

A contrary rule which would allow a finder or broker to obtain a commission for a transaction foreign to the purposes of his employment, and with which he had no connection, would be absurd. One would scarcely dare to employ a finder for a particular purpose if the employment permitted the finder to sit back, do nothing, and claim a fee for transactions completely outside the purposes of his employment. 49 Cal.R. at 195.

This is exactly the reason for the procuring cause test for real estate brokers, and instruction 11 was a prejudicially inaccurate statement of the Utah requirement.

POINT III

THE LETTER AUTHORIZING A 6% COMMISSION
CONTEMPLATED AS CONSIDERATION THAT PLAIN-
TIFFS PERFORM THE SERVICES OF A BROKER.

To have earned the 6% commission, plaintiffs must have performed the duties contemplated under the contract. As the Utah Supreme Court stated in Frederick May, supra:

[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. (Emphasis added)
368 P.2d at 269.

The commission recited, 6%, is the standard commission paid to a real estate broker for his services as a broker.

As Victor Ayers, Morris' employer, testified (Tr. 43-44):

Q. Did you see that letter when--while Mr. Morris was still employed with you?

A. Yes, sir.

Q. Did you discuss the letter with Mr. Morris?

A. Well, I had discussed with Mr. Morris prior to his getting that letter that that's the kind of protection he should obtain in working on a project such as that because it was not listed at the time with any broker.

Plaintiff Morris testified that he told John Price that
he:

Thought I had a good crack at a tenant that I had been working with over a period of time, a major tenant and was going to Los Angeles to see them, would like to take a set of plans and would he give me a letter assuring me of a commission if I did so.

He said, "Yes, come on down". ... (Tr. 19).

There is nothing from that testimony, or any other, which would infer that he was to only be a finder, and not a broker. To the contrary, Mr. Ayers testimony, above, gives the impression that such was the normal type of listing agreement for a broker to obtain in working on such a project.

In Frederick May, supra, the Utah court stated:

It is generally recognized that a broker's authority to sell property is not exclusive and does not require the payment of the commission to the broker upon a sale not procured by him, unless made so by the contract of employment in clear and unequivocal terms or by necessary implication. ...

This brokerage contract is what is called a general listing agreement which leaves the owner free to sell the property himself as long as he does so in good faith. Under such contracts a broker must be the procuring cause in order to be entitled to a commission for such sale. (Emphasis added). 368 P.2d at 268-69.

Mr. Machan, who negotiated the IBM lease for the Price organization, testified that plaintiffs did "absolutely nothing" that resulted in the procuring of the lease by the Price organization (Tr. 67), and the testimony of IBM's personnel was to the same effect.

John Price, president of defendant, testified:

I gave him parameters of the rent. I told him to bring the tenant in and that he would be -- have to be in the negotiations and put this deal together. That was my exact conversation at the very, very beginning. I didn't agree to have any other relationship with Rob. He had to come in and put it together because I have a staff that can do that so if he's going to earn a commission, he has a tenant he's got to come in and do the work. (Tr. 96).

Against that factual background, with no evidence to the contrary, plaintiffs assert that they were only required to introduce the parties, let the deal sit for 18 months, let IBM and Price do all the work, and then collect \$22,000.00 as a full 6% broker's commission for acting as a finder. That contention is unsupported in the evidence or in the law.

As stated above, the extent of the required performance must be implied to support the otherwise silent written contract. This implied additional term would constitute an implied-in-fact agreement, as defined recently by the Utah Supreme Court in Fowler v. Taylor, 554 P.2d 205 (Utah 1976).

Fowler coincidentally dealt with a real estate salesperson/broker. The court held that there was no implied-in-fact agreement as to the broker's commission because, as in the instant case, there was no mutual assent indicating an intent to be bound to a contract with certain terms:

Defendant contends there is no evidence to sustain a finding there was an implied-in-fact contract. With this contention we must agree, for there was no evidence of any action or conduct that reasonably could be construed as a manifestation of mutual assent indicating an intention to be bound on a contract whose terms were certain. ... The terms of the alleged agreement are unknown, viz., the duties, conditions, and compensation. Defendant believed the use of plaintiff's license was gratuitous; plaintiff expected to receive the entire fruits of defendant's contract. Their conduct cannot be construed as a manifestation of mutual assent to a contract whose terms are certain. (Emphasis added). Id. at 208-09.

Similarly, in the instant case the performance requirement of the agreement was silent. Thus, the court should have instructed the jury clearly on the applicable aspects of contract law and the terms which must be implied-in-fact in order to establish a binding agreement. There was no such instruction.

Further, the court refused to give defendant's proposed special verdict, over defendant's objection "that the general verdict allows the Jury to speculate on matters of contract law regarding which they were not instructed and allows them to imply elements into the contract arrangement which may or may not have existed". (Tr. 116).

There was no evidence that less performance was required or anticipated than that of a broker to earn the standard 6% commission. The fact that the commission was the standard 6% itself infers that the performance required must be that of a broker. Yet, the instruction given by the court set out the standard for a finder, a lower standard of performance than contemplated by the parties, and none not supported by Utah law in the absence of a clear and unambiguous contract to the contrary.

CONCLUSION

For the foregoing reasons, the Judgment of the lower court should be reversed.

Respectfully submitted this 7th day of December, 1978.

SNOW, CHRISTENSEN & MARTINEAU

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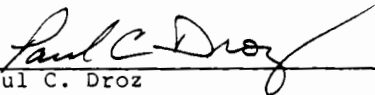
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CERTIFICATE OF SERVICE

I hereby certify that I personally delivered two (2) copies of the foregoing Reply Brief of Appellant to counsel for Respondents this 7th day of December, 1978.



Paul C. Droz