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IN THE SUPREME COURT

OF THE STATE OF UTAH

KIM L. NORRIS, LEX R. NORRIS, and LANNY T. NORRIS, d/b/a L.K.L. ASSOCIATES, a partnership, and TAYLOR NATIONAL REAL ESTATE, a corporation,

Plaintiffs and Appellants,

v.

A. M. ANDERSON and NORA S. ANDERSON, husband and wife,

Defendants and Respondents.

Case No. 15718

BRIEF OF RESPONDENTS

Appeal from the Judgment of the Fourth Judicial District Court of Utah County, Honorable George E. Ballif, Judge.

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FILED

JUL - 7 1978

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT

OF THE STATE OF UTAH

KIM L. NORRIS, LEX R. NORRIS, and LANNY T. NORRIS, d/b/a L.K.L. ASSOCIATES, a partnership, and TAYLOR NATIONAL REAL ESTATE, a corporation,

Plaintiffs and Appellants,

v.

A. M. ANDERSON and NORA S. ANDERSON, husband and wife,

Defendants and Respondents.

Case No. 15718

BRIEF OF RESPONDENTS

NATURE OF THE CASE

This is an action to compel specific performance of an alleged agreement for the sale of real property or, in the alternative, for payment of a real estate commission.

DISPOSITION IN THE LOWER COURT

The trial court found in favor of defendants, held that no contract was formed, and dismissed the Complaint of plaintiffs, no cause of action.

RELIEF SOUGHT ON APPEAL

Defendants and appellants respectfully request that this Court affirm the judgment of the trial court.

STATEMENT OF FACTS

At all times material hereto, the plaintiffs and appellants, Kim L. Norris, Lex R. Norris, and Lanny T. Norris, were brothers

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and partners doing business as a partnership under the name and style of L.K.L. Associates, and the plaintiff and appellant, Taylor National Real Estate, was a corporation doing business as a real estate agency, with its principal place of business located in Orem, Utah. At all times material hereto, the defendants and respondents, A.M. Anderson and Nora S. Anderson, were husband and wife, residing in Orem, Utah.

On September 10, 1976, the Andersons entered into a Sales Agency Contract with Boley Realty, Inc., of American Fork, Utah, for multiple listing of a tract of land which they owned in Orem, Utah. Dean Hall, salesman for Boley Realty, Inc., prepared the listing agreement (Exhibit "1") which specified a total sales price of $250,000.00, with a down payment of $40,000.00, and terms for the payment of the balance to be negotiated with the sellers. (Tr., pp. 11-12, 116)

On Friday, January 7, 1977, the plaintiffs, L.K.L. Associates, by and through their agent, Bryce Taylor, salesman for the plaintiff, Taylor National Real Estate, made an offer to purchase the property. (Exhibit "2") Said offer admittedly did not comply with the terms of the listing, in that it consisted of $5,000.00 down and $15,000.00 payable on January 30, 1977, or only <u>one-half</u> of the down payment required by the listing agreement, and it contained various other differing terms and conditions. (Tr. pp. 40, 95)

On Saturday, January 8, 1977, Bryce Taylor and Dean Hall met with the Andersons to present the offer. At that time, the Earnest Money Receipt and Offer to Purchase (Exhibit "2")

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was complete through the signature of L.K.L. Associates on line 57. (Tr., pp. 12, 26, 95, 117) Because the terms of this offer were at variance with the terms of the listing agreement, and because of the size and nature of the transaction, the Andersons wanted some time to evaluate and consider it. (Tr., pp. 27, 95, 118)

After due consideration, Mr. Anderson rejected plaintiffs' offer outright. (Tr., pp. 13, 95)

On the morning of Tuesday, January 11, 1977, the Andersons met with Mackey Boley and Dean Hall and reviewed the plaintiffs' offer. Being concerned with the ability of the Norris brothers to perform, and not wanting to release title to the land before it was paid for, nor to accept a second mortgage upon land which they already owned outright, all of which were conditions of the plaintiffs' offer, the Andersons formulated a counter-offer consisting of seven points, which was drafted at the office of Boley Realty, Inc. in American Fork on that day. (Tr., pp. 13, 95, 118-119)

In the afternoon of that same day (Tuesday, January 11, 1977), Dean Hall met with Bryce Taylor, the plaintiffs', Norris's agent, at the Andersons' home to present the counter-offer. At that time, a separate page incorporating the seven points of the defendants' counter-offer was attached to plaintiffs' original offer, and now appears as page two of Exhibit "2". After communicating to and reviewing the terms of the defendants' counter-offer with Bryce Taylor, Mr. Anderson crossed out lines 48 through 55 on page one of

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Exhibit "2" (plaintiffs' original offer), the same being unacceptable to him.

At the Andersons' direction, Bryce Taylor then wrote the handwritten language which appears below line 57 on page one of Exhibit "2" (plaintiffs' original offer), as follows:

> Seller agrees to the terms above stated with the indorporation of the seven points outlined on the attached ammendment [sic.] sheet. Subject to buyer's acceptance within five days. (Emphasis added.)

Mr. and Mrs. Anderson then each signed both pages of Exhibit "2", and Mr. Anderson dated both pages on that date, January 11, 1977. (Tr., pp. 13-14, 28-29, 41-42, 95-97, 119-120)

Upon completion of the defendants' counter-offer, Mr. Anderson handed it to Dean Hall, who in turn handed it to Bryce Taylor. (Tr., pp. 15-16) Bryce Taylor, having been engaged by the Norris brothers as their agent to communicate with Boley Realty, Inc., the listing agency, and Dean Hall, its salesman, in all matters relative to the purchase of the property, and having presented their original offer to the defendants, then took the defendants' counter-offer, Exhibit "2", to the Norris brothers for their consideration. (Tr., pp. 29-30)

Bryce Taylor was unsure as to when he presented the defendants' counter-offer to the Norris brothers. (Tr., pp. 29-30) On Friday, January 14, 1977, L.K.L. Associates, by and through Kim L. Norris, allegedly accepted five of the seven points of the Andersons' counter-offer. This qualified

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acceptance was handwritten beneath the signatures of the Andersons on their counter-offer, at page two of Exhibit "2", and was made expressly subject to the following conditions:

> Buyer agrees to counter-offer subject to deletion of 50' easement and subject to seller's acceptance of second mortgage provision contained in original offer. (Emphasis added.)

This qualified and conditional acceptance was apparently then signed by Kim L. Norris and dated on that date, January 14, 1977 (Exhibit "2"; Tr., pp. 30, 42-43, 72-73), but was never at that time delivered to the defendants in written form.

After obtaining the plaintiffs' qualified and conditional acceptance of the defendants' counter-offer, Bryce Taylor called Dean Hall to advise him of that development, and to arrange a new meeting with the Andersons. Dean Hall, in turn, communicated verbal notice of the plaintiffs', Norris's, conditional acceptance of the defendants' counter-offer to the Andersons, informing them that two of the seven points of their counter-offer were unacceptable to L.K.L. Associates (Norris brothers) and arranged to discuss the matter with them on the following day. (Tr., pp. 16, 30, 44-45, 97, 120-121)

The next evening, Saturday, January 15, 1977, Bryce Taylor and Dean Hall met again at the Andersons' home. At that time, Mr. Taylor attempted to persuade the Andersons to delete the two points of their counter-offer which the Norris brothers had found unacceptable. Mr. Anderson was adamant

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in stating that he would <u>not</u> delete those two points from his counter-offer, and that the counter-offer had to be accepted by the Norris brothers <u>exactly as written</u>. (Tr., pp. 16-17, 98-99, 104-105, 111-112, 113, 121-122)

Mr. Anderson told Bryce Taylor that the Norris brothers still had one day left before the expiration of the five-day time limit on the counter-offer, made on Tuesday, January 11, 1977, and that he would honor his commitment until that time. (Tr., pp. 104-105, 113) However, Mr. Anderson did not on that date see or receive the written, qualified, and conditional acceptance allegedly obtained by Bryce Taylor from L.K.L. Associates the day before. The meeting ended, with no agreement reached, and no definite arrangements were made to meet again. (Tr., pp. 17, 44, 46, 99, 121-122, 134-136)

On Monday, January 17, 1977, Dean Hall called Mr. Anderson to determine how he felt about the purported qualified and conditional acceptance of his counter-offer. Mr. Anderson refused to bend on either of the two points of his counter-offer, and reiterated that he would only accept it as written and submitted. (Tr., pp. 122, 137) On the same day (January 17, 1977), Mr. Hall called Bryce Taylor and conveyed this information to him. Mr. Taylor replied, "<u>The Norris brothers can do no more</u>." (Tr., pp. 34-35, 47, 122-123, 137-138)

Dean Hall then called Mr. Anderson back, and informed him of Bryce Taylor's words, "The Norris brothers can do no more." Mr. Anderson then told Dean Hall that the counter-

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offer had expired, and that the deal was off. He did not say that he would stand on the counter-offer on that day. (Tr., pp. 18-20)

On Tuesday, January 18, 1977, seven days after the defendants' counter-offer was presented, Bryce Taylor called Dean Hall back and informed him that the Norris brothers wanted to accept the Andersons' counter-offer. (Tr., pp. 35-36, 123-124) Mr. Taylor had earlier conferred with the Norris brothers, who, by and through Lanny T. Norris, had apparently lined out the language of their qualified and conditional acceptance on page two of Exhibit "2", and had written beneath it, "Buyer accepts counter-offer as written." Lanny T. Norris then allegedly signed and dated the document on that day, January 18, 1977. (Tr., pp. 63, 65) This written unconditional acceptance was not delivered to the defendants, however, until one month later, when it arrived by mail, on February 17, 1977. (Tr., pp. 15, 50, 99, 124-125)

Bryce Taylor acknowledged to Dean Hall that the acceptance was late, having been communicated orally after the five-day time limit to the defendants' counter-offer had expired. (Tr., pp. 36, 124) Thus, he was anxious to see if the Andersons would recognize the plaintiffs', Norris's tardy unconditional acceptance. Mr. Hall called Mr. Anderson, and told him that Bryce Taylor had orally informed him that the Norris brothers had changed their minds, and wanted to accept the defendants' counter-offer. (Tr., pp. 20, 112) Mr. Anderson responded

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that there wasn't any counter-offer any more; that the counter-offer was dead. (Tr., p. 114)

Because Mr. Anderson felt that his counter-offer to the plaintiffs, Norris, had expired, while at the same time Bryce Taylor was urging that he consider their late unconditional acceptance thereof, Dean Hall sought the advice of his broker, Mackey Boley. That evening (January 18, 1977), after arrangements had been made to meet with the Andersons on the following day, Mr. Boley indicated that he also felt that the counter-offer had expired. Mr. Boley, on his behalf, then had Dean Hall draft another offer to purchase the Anderson property for himself. (Exhibit "11"; Tr., pp. 130-133)

On Wednesday morning, January 19, 1977, Dean Hall arrived first at the Andersons' home, and indicated that he had a second offer, from Mackey Boley, to purchase the property. Bryce Taylor then arrived, and Mr. Hall told him that there were now two offers to consider. (Tr., pp. 22, 37, 101, 126, 135) Moments later, Paul Taylor, father of Bryce Taylor and broker of the plaintiff, Taylor National Real Estate, arrived and attempted to coerce the Andersons into agreeing to honor the late unconditional acceptance of the defendants' counter-offer by L.K.L. Associates. Although Bryce Taylor had apparently brought the signed unconditional acceptance (page two of Exhibit "2") with him to the meeting, it was never shown to nor left with Mr. Anderson. (Tr., pp. 22, 36-39, 48, 102-103, 105, 124-125, 139) The Boley offer was

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withdrawn the same day. (Tr., pp. 129-130)

Later that afternoon, Kim and Lanny Norris stopped by the Andersons' home. It was the first time the parties had ever met face-to-face. The Norris brothers offered to meet or beat any offer made by Mr. Boley, and Mr. Anderson told them that he refused to enter a bidding situation, and that, if they had unconditionally accepted his counter-offer within the time limited in it, they would have bought the property. (Tr., pp. 22-24, 66-69, 72, 103-104)

On February 16, 1977, plaintiffs then filed this action and, for the first time, mailed to the Andersons a copy of the fully executed unconditional acceptance of the defendants' counter-offer (page two of Exhibit "2") by L.K.L. Associates (the Norris brothers). The document was received by the Andersons on February 17, 1977, one month after the purported unconditional acceptance thereof, which was the first time the unconditional acceptance, in writing, was ever seen by either the Andersons or Dean Hall (Tr., pp. 15, 50, 99, 124-125), during all of which time, such purported written acceptance remained in the exclusive possession and control of the plaintiffs, with the power and opportunity in them to alter, amend, assert, or withhold as they saw fit.

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ARGUMENT

POINT I

THE DEFENDANTS' COUNTER-OFFER WAS REJECTED BY PLAINTIFFS' QUALIFIED AND CONDITIONAL ACCEPTANCE, AND COULD NOT BE REVIVED IN ITS ORIGINAL FORM BY A SUBSEQUENT ACCEPTANCE.

It must first be remembered that the facts of this case must be viewed in the light most favorable to the judgment entered by the trial court, which is presumed to be correct, and that such judgment should be sustained, unless the evidence clearly preponderates against it. Stucki v. Stucki, 562 P. 2d 240 (Utah 1977); Fisher v. Taylor, 572 P. 2d 393 (Utah 1977); Oberhansly v. Earle, 572 P. 2d 1384 (Utah 1977).

It is elementary contract law that a binding contract can exist only where there has been mutual assent by the parties, manifesting their intention to be bound by its terms. Allen v. Bissinger & Co., 62 Utah 226, 219 P. 539, 31 A.L.R. 376 (1923); Bunnell v. Bills, 13 Utah 2d 83, 368 P. 2d 597 (1962). Furthermore, there is no liability to perform a specified act until the person to whom an offer has been made has accepted it according to its terms. 17 Am. Jur. 2d Contracts § 32 (1964).

When the plaintiffs first tendered their original offer, dated January 7, 1977, its terms were so contrary to the requirements of the listing agreement (Exhibit "1") that the defendant, Mr. Anderson, rejected it outright. (Tr., pp. 13, 95) That act terminated and destroyed plaintiffs' offer, and the trial court so found. The Andersons then formulated their seven-point counter-offer, which was signed, dated, and presented to Bryce Taylor, agent for the Norris brothers, on

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Tuesday, January 11, 1977, thereby replacing the plaintiffs' original offer. 17 Am. Jur. 2d Contracts § 40 (1964). Thus, the defendants' counter-offer is the only viable offer or counter-offer with which we are concerned in this case. When, therefore, on Friday, January 14, 1977, Kim L. Norris allegedly accepted five of the seven points of the defendants' counter-offer, but rejected two of the conditions specified therein, the defendants' counter-offer was thereby terminated. The trial court specifically held that this qualified and conditional acceptance amounted to a rejection of the Andersons' counter-offer:

> Any words or acts of the offeree indicating that he declines the offer, or which justify the offeror in inferring that the offeree intends not to accept the offer or give it further consideration, amounts to a rejection. ...Likewise, the preparation of a new contract with different terms and provisions for consideration of the offeror is a rejection of his offer. An offer is rejected by a counter-offer, and in this respect a qualified or conditional acceptance constitutes a counter-offer. ... (Emphasis added.) 17 Am. Jur. 2d Contracts § 39 (1964).

The acceptance of an offer which is necessary to create a binding contract requires manifestation of unconditional agreement to all of the terms of the offer, and intent to be bound thereby, and must not add any new material conditions thereto or deviate therefrom. R. J. Daum Constr. Co. v. Child, 122 Utah 194, 247 P. 2d 817 (1952); Williams v. Espey, 11 Utah 2d 317, 358 P. 2d 903 (1961). Here, where plaintiffs' qualified and conditional acceptance was specifically made subject to deletion of a 50-foot easement and subject also to seller's acceptance of the second mortgage provision

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contained in the plaintiffs' original offer, and Mr. Anderson adamantly refused to delete either point from his counter-offer, no meeting of the minds was reached, and, consequently, the defendants' counter-offer was rejected.

As a result of such rejection, the trial court specifically found that the defendants' counter-offer could not, by a subsequent act of the rejecting offeree (L.K.L. Associates), be accepted in its original form:

> An offer is terminated by rejection and cannot thereafter be accepted so as to create a contract. Having once rejected the offer, the offeree cannot revive it by tendering acceptance. (Emphasis added.) 17 Am. Jur. 2d Contracts § 39 (1964).

In Burton v. Coombs, 557 P. 2d 148 (Utah 1976), this Court held that, if an offer is rejected by refusal, conditional acceptance, or by counter-offer, the party making the original offer is relieved from liability, and the party who rejected the offer cannot, of his own volition, create an agreement by his subsequent acceptance:

> We hold, therefore, as a matter of law, defendants were not bound by an offer which had been unequivocally rejected by plaintiffs and which had not been renewed prior to plaintiffs' subsequent attempt to effect an acceptance. (Emphasis added.) 557 P. 2d at 150.

Plaintiffs make some claim that there was a "firm and absolute renewal" or reinstatement by defendants of their original counter-offer on Monday, January 17, 1977. There is no competent evidence to support such an assertion, and the trial court specifically so found.

First, on Saturday, January 15, 1977, when Bryce Taylor attempted to persuade the Andersons to delete the two points

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of their counter-offer which the Norris brothers had found unacceptable, Mr. Anderson adamantly refused to do so, and declared that the counter-offer had to be accepted by the Norris brothers exactly as written. (Tr., pp. 16-17, 98-99, 104-105, 111-112, 113, 121-122)

Furthermore, on Monday, January 17, 1977, when Dean Hall called Mr. Anderson back to see how he felt about the plaintiffs' purported qualified and conditional acceptance of his counter-offer, Mr. Anderson still refused to bend on either of the two points of his counter-offer, and reiterated that he would only accept it as written and submitted. (Tr., pp. 122, 137) Then, after Mr. Hall called back and informed him of Bryce Taylor's words, "The Norris brothers can do no more," Mr. Anderson told Dean Hall that the counter-offer had expired, and that the deal was off. Despite repeated and insistent questioning by plaintiffs' counsel (the identical issue having been previously raised by plaintiffs in their Motion to Compel Answers to Oral Interrogatories, which Motion was denied by the trial court), Mr. Anderson's clear and unequivocal testimony is that, on Monday, January 17, 1977, he did not say that he would stand on the counter-offer. (Tr., pp. 18-20)

In the face of this unrebutted evidence, the trial court found that the communication back to Taylor was that the counter-offer as submitted was all that the Andersons would agree to. In its Decision dated February 14, 1978, the court held:

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> The plaintiffs' contention that conduct of the defendants either by word or action extended the five-day period on the counter-offer, or in any manner constituted a waiver of that limitation, is without support in the evidence, and plaintiffs have failed to prove these contentions. (Emphasis added.)

In light of the foregoing, respondents respectfully submit that the defendants' counter-offer was terminated and rejected by plaintiffs' qualified and conditional acceptance dated January 14, 1977; that it was unequivocally rejected on January 17, 1977, when Bryce Taylor informed the defendants, through Dean Hall, that "the Norris brothers can do no more"; and that it could not be revived in its original form by a purported subsequent acceptance. Burton v. Coombs, supra.

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POINT II

THE COUNTER-OFFER OF DEFENDANTS EXPIRED BEFORE PLAINTIFFS PURPORTED TO ACCEPT IT.

Plaintiffs next contend that their purported acceptance of defendants' counter-offer was made within the time limit prescribed therein. It is undisputed that all parties concerned clearly understood the nature and consequences of that limitation. On Tuesday, January 11, 1977, at the Andersons' direction, Bryce Taylor himself, agent for the Norris brothers, drafted the language of defendants' counter-offer (Exhibit "2"), "Subject to buyer's acceptance within five days" (Tr., pp. 28-29, 41-42, 95-97, 119-120), and the Andersons affixed that date (January 11, 1977) to their counter-offer.

On Saturday, January 15, 1977, Mr. Anderson told Bryce Taylor that the Norris brothers still had one day left before the expiration of the five-day limit on the counter-offer, and that he would honor his commitment until that time. (Tr., pp. 104-105, 113) When asked what he meant by that statement, Mr. Anderson specifically declared that the acceptance had to be within the five-day period. (Tr., p. 110) Moreover, when Kim and Lanny Norris stopped by the Andersons' home on Wednesday, January 19, 1977, Mr. Anderson told them that, if they had unconditionally accepted his counter-offer within the time limit, they would have bought the property, and each of the Norris brothers acknowledged that statement. (Tr., pp. 22-24, 66-69, 72, 103-104)

It is clear, therefore, that apart from any considerations of rejection by the plaintiffs, Norris, of the defendants'

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counter-offer, where the Andersons fixed a specific time limit of five days, within which time plaintiffs were required to accept their counter-offer, and at the same time dated such counter-offer, it expired by its own terms upon the lapse of those five days without unconditional acceptance thereof:

> The time within which an acceptance must be made is correlative with the duration of the offer. An offeree's power of acceptance continues until terminated by acceptance or rejection or by any other means regarded as effective by law. The proposer may limit the time for acceptance, since every person has the right to dictate the terms upon which he will contract, and an offer which specifies a time for its duration terminates by the lapse of the time specified therein; the acceptance must take place within that time. ... (Emphasis added.) 17 Am. Jur. 2d Contracts § 56 (1964).

> If the terms of an offer to buy or sell real estate stipulate that the acceptance of such offer is to be made within a certain time, it is essential, in order to constitute a binding contract, for the offeree to communicate his acceptance within the time stipulated; upon the lapse of such time the offer terminates ipso facto, and acceptance thereafter is of no legal effect. ... (Emphasis added.) 77 Am. Jur. 2d Vendor and Purchaser § 20 (1975).

The Utah statute regarding computation of time, Utah Code Ann. § 68-3-7, prescribes:

> The time in which any act provided by law is to be done is computed by excluding the first day and including the last, unless the last is a holiday, and then it also is excluded.

Thus, the defendants' counter-offer, dated Tuesday, January 11, 1977, would have expired by its own terms five days later, on Sunday, January 16, 1977. However, under Utah Code Ann. § 63-13-2, every Sunday is deemed to be a legal holiday. Therefore, the trial court found that

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Sunday, January 16, 1977, was not counted, so that plaintiffs had through Monday, January 17, 1977, to accept the defendants' counter-offer, pursuant to Utah Code Ann. § 68-3-8:

> Whenever any act of a secular nature, other than a work of necessity or mercy, is appointed by law or contract to be performed upon a particular day, which day falls upon a holiday, such act may be performed upon the next succeeding business day with the same effect as if it had been performed upon the day appointed. (Emphasis added.)

The evidence is further undisputed that on Monday, January 17, 1977, when Dean Hall called Bryce Taylor and told him that Mr. Anderson refused to bend on either of the two points of his counter-offer, Mr. Taylor replied, "The Norris brothers can do no more." (Tr., pp. 34-35, 47, 122-123, 137-138) When Bryce Taylor's words were relayed back to Mr. Anderson, he told Dean Hall that the counter-offer had expired, and that the deal was off. (Tr., pp. 18-20)

More importantly, on Tuesday, January 18, 1977, after the Norris brothers had purportedly accepted the defendants' counter-offer, for the first time unconditionally, Bryce Taylor himself acknowledged to Dean Hall that the acceptance was late. (Tr., pp. 36, 124)

Finally, the evidence is clear that neither the Andersons nor Dean Hall ever saw or received the plaintiffs' purported acceptance in writing, dated Tuesday, January 18, 1977, until one month later, on February 17, 1977, after this lawsuit was filed, when they received it by mail. (Tr., pp. 15, 50, 99, 124-125) During that entire time, such purported written acceptance remained in the exclusive possession and control of the plaintiffs, subject to their power and opportunity

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to do with as they saw fit.

In view of this evidence, the trial court held that "The plaintiffs did not accept defendants' counter-offer on the 17th of January, which was the 6th day after the counter-offer had been made by defendants." Under the best view of plaintiffs' evidence, no acceptance was made until Tuesday, January 18, 1977, which acceptance was not communicated in writing to defendants until one month later.

Mr. Anderson clearly intended for his counter-offer to expire within five days, and such provision must be construed in accordance with the intention of the parties. 17 Am. Jur. 2d Contracts § 329 (1964). Thus, even if the counter-offer was not terminated and rejected by plaintiffs' qualified and conditional acceptance of Friday, January 14, 1977, it nevertheless expired after five days by its own terms.

The Norris brothers constituted Bryce Taylor as their agent to convey their original offer to the defendants on January 7, 1977, and, by so doing, also constituted him as their agent to receive, on their behalf, any acceptance or rejection thereof or other response thereto. The delivery of the defendants' signed and dated counter-offer to Mr. Taylor on January 11, 1977, was, therefore, tantamount to delivery of the same to the Norris brothers (L.K.L. Associates) on that date, and the time limited therein for acceptance thereof commenced to run on the date of such delivery (Tuesday, January 11, 1977).

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POINT III

PLAINTIFFS NEVER PRODUCED A BUYER WHO WAS READY, WILLING, AND ABLE TO PURCHASE THE SUBJECT PROPERTY ACCORDING TO THE TERMS OF THE LISTING.

Without exception, every authority relied upon by plaintiffs in their brief states that a broker is entitled to a commission when he finds a buyer who is ready, willing, and able to purchase, but only according to the terms specified in the listing agreement. On the other hand, a broker is not entitled to the compensation called for by his contract of employment until he produces a person who is ready, willing, and able both to accept and live up to the terms offered by his principal. Watson v. Odell, 58 Utah 276, 198 P. 772, 20 A.L.R. 280 (1921); 12 Am. Jur. 2d Brokers § 183 (1964).

Such ability to perform by a prospective purchaser is defined as follows:

> ...[I]t is clear in general that the proposed purchaser must have the legal capacity to purchase, in addition to having sufficient financial ability not only to make the initial payment required to meet the terms of the seller, but also to complete the contract of purchase according to its terms -- that is, to meet any deferred payments. ... (Emphasis added.) 12 Am. Jur. 2d Brokers § 184 (1964).

Even if plaintiffs were financially able to meet the terms specified by defendants, their offer never complied with such terms. The listing agreement, Exhibit "1", specified a total sales price of $250,000.00, with a down payment of $40,000.00, and terms for the payment of the balance to be negotiated with the seller. Bryce Taylor himself admitted that the plaintiffs' original offer, Exhibit "2", dated January 7, 1977, was not in conformity with those terms.

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(Tr., pp. 40, 95)

The Sales Agency Contract itself, Exhibit "1", entitles a broker to his commission, as cited in plaintiffs' brief, only when he procures a party ready, willing, and able to buy "at the price and terms stated hereon, or at such other price or terms to which I may agree in writing." (Emphasis added.)

Plaintiffs' offer pursuant to the said listing agreement, dated January 7, 1977 (Exhibit "2"), consisted of $5,000.00 down and $15,000.00 payable on January 30, 1977, which constituted only one-half of the down payment required by the listing agreement. Such proposal was never agreed to by defendants. Instead, the first of the seven points of their counter-offer (attached as page two of Exhibit "2") was for $25,000.00 down. This counter-offer, as previously discussed under Points I and II, supra, was first rejected on January 14, 1977, by plaintiffs' qualified and conditional acceptance; expired by its own terms after the lapse of five days; and was expressly and unequivocally rejected on January 17, 1977, by the words, "the Norris brothers can do no more." No unconditional acceptance was ever communicated to the defendants until after January 17, 1977, and, in fact, was ever delivered to the defendants in writing until one month had elapsed.

Plaintiffs' original, and all subsequent offers through January 17, 1977, were clearly at odds with the terms authorized by defendants, as sellers, in their listing agreement.

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Thus:

> Where a broker, instead of procuring a person who is ready, able, and willing to accept the terms his principal authorized him to offer at the time of his employment, procures one who makes a counter-offer more or less at variance with that of his employer, the latter is at liberty either to accept the proposed party upon the altered terms or to decline to do so, without giving the broker his reasons for the refusal. If he accepts he is legally obligated to compensate the broker for the services rendered, but if he refuses he incurs no liability therefor. In other words, if the principal does not see fit to modify his original proposals the broker can lay no claim to his commissions until he produces a person who is ready, able, and willing to accept the exact terms of his principal. (Emphasis added.) 12 Am. Jur. 2d Brokers § 185 (1964).

This Court addressed this precise issue in Hansen v. Snell, 11 Utah 2d 64, 354 P. 2d 1070 (1960). In that case, the listing agreement specified a price of $43,000.00 cash, followed by a recital in the seller's handwriting, "terms to suit the seller." The broker produced a prospective purchaser, but the seller demanded 10% interest on the deferred balance, to which the buyer refused to agree. The broker brought an action for his commission, which was awarded by the trial court. This Court reversed, holding that the seller could not be held to any commitment other than the terms expressed in the real estate sales agency contract:

> ...The proposed buyer being unwilling to purchase upon the terms insisted upon by her [defendant seller], cannot be regarded as a willing purchaser under the contract she signed, and the plaintiff cannot compel her to pay his commission.
>
> This disposition of the case obviates the necessity of considering the plaintiff's claim that he was entitled to be awarded attorney's fees under the provisions in the contract. (Emphasis added.) 11 Utah 2d at 66, 354 P. 2d at 1072.

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To the same effect, see, Annot., 18 A.L.R. 2d 376 (1951); Sproul v. Parks, 116 Utah 368, 210 P. 2d 436 (1949); Lynn v. K.C. Ranches, Inc., 19 Utah 2d 3, 425 P. 2d 403 (1967); Clegg v. Lee, 30 Utah 2d 242, 516 P. 2d 348 (1973); Weaver v. Modula, 557 P. 2d 152 (Utah 1976).

In Davis v. Heath Dev. Co., 558 P. 2d 594 (Utah 1976), cited by plaintiffs in their brief, the listing agreement called for a sales price of $400,000.00, to which the buyers counter-offered $250,000.00. The Court refused to award a commission to the broker:

> ...Where such a counter-offer of a lesser amount is made, the seller is at liberty to accept the offer, but is under no obligation to do so; and if he refuses, he incurs no liability for the real estate commission. 558 P. 2d at 596.

More recently, in Boyer Co. v. Lignell, 567 P. 2d 1112 (Utah 1977), the defendants' letter authorizing sale fixed a purchase price of $950,000.00, subject to approval of a specified insurance company, and separating the "Dental Building" from the transaction. The plaintiff broker presented an Earnest Money Receipt and Offer to Purchase, offering a price of $921,500.00, subject to the insurance company's mortgage, and to a lease-back agreement by the sellers. The plaintiff broker brought an action for his commission, and the trial court found for the defendant sellers. This Court affirmed, declaring:

> The law is well settled that the broker is not entitled to a real estate commission until he has a written binding offer or agreement signed by a ready, willing and able purchaser. This means that all of the terms and conditions must be agreed upon between the parties. Since all of the terms

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were not agreed upon between the parties, no commission was earned. (Emphasis added.) 567 P. 2d at 1114.

In sum, plaintiffs never complied with the terms of the listing agreement, nor was the counter-offer of defendants accepted by plaintiffs according to the precise terms required therein. Because, therefore, plaintiffs never produced a buyer who was ready, willing, and able to meet the exact terms of the seller, they are not entitled to any real estate commission. Furthermore, under the authority of Hansen v. Snell, supra, they are not entitled to an award of attorney's fees under the provisions of the listing agreement or otherwise.

CONCLUSION

The defendants' counter-offer was terminated and rejected by plaintiffs' qualified and conditional acceptance dated January 14, 1977, and it could not be revived in its original form by a subsequent acceptance. Thereafter, on Monday, January 17, 1977, the counter-offer expired by its own terms before plaintiffs purported to accept it, and was expressly rejected by the plaintiffs on that date. Because plaintiffs never complied with the exact terms of either the listing agreement or of the defendants' counter-offer, in producing a buyer who was ready, willing, and able to meet such terms, no contract was ever formed, and they are not entitled to any real estate commission, nor are they entitled to an award of attorney's fees under the provisions of the listing agreement or otherwise.

Respondents respectfully submit that the judgment of

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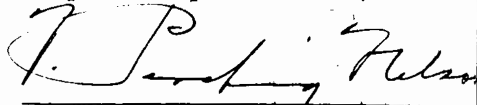
the trial court was correct, and request that it be affirmed.

Respectfully submitted,



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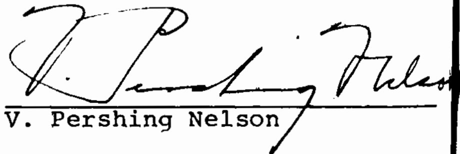
CERTIFICATE OF MAILING

I hereby certify that on the 7th day of July, 1978, I mailed, postage prepaid, two copies of the foregoing Brief of Respondents to S. REX LEWIS and ROBERT C. FILLERUP, HOWARD, LEWIS & PETERSEN, Attorneys for Appellants, 120 East 300 North, Provo, Utah 84601.



V. Pershing Nelson

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