

1978

Kim L. Norris et al v. A. M. Anderson : Brief of Plaintiffs-Appellants

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

KIM L. NORRIS, LEX R.
NORRIS, et al.

Plaintiffs-Appellants,

-vs-

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

Defendants-Respondents.

BRIEF OF PLAINTIFFS-APPELLANTS

APPEAL FROM THE JUDGMENT OF THE
DISTRICT COURT OF UTAH COUNTY,
HONORABLE GEORGE E. BASKIN, JUDGE

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Respondents

IN THE SUPREME COURT
OF THE STATE OF UTAH

KIM L. NORRIS, LEX R. :
NORRIS, et al. :
 :
Plaintiffs-Appellants, : Case No. 15,718
-vs- :
 :
A. M. ANDERSON and NORA S. :
ANDERSON, husband and wife, :
 :
Defendants-Respondents. :

BRIEF OF PLAINTIFFS-APPELLANTS

APPEAL FROM THE JUDGMENT OF THE FOURTH JUDICIAL
DISTRICT COURT OF UTAH COUNTY, STATE OF UTAH
HONORABLE GEORGE E. BALLIF, PRESIDING

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IN THE SUPREME COURT
OF THE STATE OF UTAH

KIM L. NORRIS, LEX R.	:	
NORRIS, et al.	:	
Plaintiffs-Appellants,	:	
-vs-	:	Case No. 15,718
	:	
A. M. ANDERSON and NORA S.	:	
ANDERSON, husband and wife,	:	
Defendants-Respondents.	:	

BRIEF OF PLAINTIFFS-APPELLANTS

STATEMENT OF THE KIND OF CASE

This is an action to compel specific performance of an agreement to sell certain real property and to collect a real estate commission for the real estate agency handling the transaction.

DISPOSITION IN A LOWER COURT

The case was tried before the Court on February 1, 1978, the Honorable George E. Ballif, Judge, sitting without a jury, and on February 14, 1978, the Court filed its decision, dismissing the complaint of the plaintiff, no cause of action. (R. 34-36). The Decree and Judgment reflecting the decision of the Court was signed by the Court on February 24, 1978. (R. 15-16).

RELIEF SOUGHT ON APPEAL

Plaintiffs seek a reversal of the judgment of the trial court and an Order of this Court compelling specific performance

and awarding a real estate commission, including attorneys fees and costs.

STATEMENT OF FACTS

The plaintiffs in this action, Kim L. Norris, Lex R. Norris, and Lanny T. Norris are all brothers and are partners doing business as LKL Associates. Taylor National Real Estate, the other plaintiff, is a real estate agency located in Orem, Utah. The defendants, A. M. Anderson and Nora S. Anderson, are also residents of Orem, Utah, and are the owners of a certain parcel of real property which is the subject matter of the dispute.

In September of 1976, the defendants listed their property through Boley Realty on the Utah County Multiple Listing Service, (P. Exhibit 1), agreeing to pay a 6% commission in accordance with the terms of the listing. On January 7, 1977, the plaintiffs, LKL Associates, through their agent, Bryce K. Taylor, of Taylor National Real Estate, submitted an Earnest Money Receipt and Offer to Purchase to the Andersons which constituted an offer to purchase the subject property for \$250,000.00. (P. Exhibit 2). The Offer to Purchase was given to the Andersons at their home by Mr. Taylor through Mr. Dean Hall, of Boley Realty. At the time the offer was presented, it contained only the information through line 57. (T. 12, 26). After receiving the offer, Hall and the Andersons upon the encouragement of Mr. Hall went to see Mr. Boley about making a counter-offer. (T.

13, 118-119). At that meeting between the Andersons, Hall

TABLE OF CONTENTS

	<u>PAGE</u>
STATEMENT OF THE KIND OF CASE	1
DISPOSITION IN A LOWER COURT	1
RELIEF SOUGHT ON APPEAL	1
STATEMENT OF FACTS	2
POINT I	
THE TRIAL COURT ERRED IN FAILING TO COMPEL SPECIFIC PERFORMANCE	8
POINT II	
THE PLAINTIFF, TAYLOR NATIONAL REAL ESTATE, IS ENTITLED TO A COMMISSION FOR FINDING A BUYER WHO WAS READY, WILLING AND ABLE TO PURCHASE	14
CONCLUSION	19
CASES CITED	
<u>Burton v. Coombs</u> , 557 P.2d 148 (Utah 1976)	10
<u>Curtis v. Mortensen</u> , 1 Utah2d 354, 267 P.2d 237 (1954)	15,17,19
<u>Davis v. Health Development Company,,</u> 558 P.2d 594 (Utah, 1976)	18,19
<u>Garff Realty Co. v. Better Buildings, Inc.,</u> 120 Utah 344, 234 P.2d 842 (1951)	15,17
<u>Hoyt v. Wasatch Homes</u> , 1 Utah2d 9, 261 P.2d 928 (1953)	18,19
<u>Martineau v. Hanson</u> , 47 Utah 549, 155 P. 432 (1916)	15
<u>Ogden Savings Bank and Trust Co. v. Blakely</u> , 66 Utah 229, 241 P. 221 (1925)	15
<u>Reich v. Christopoulos</u> , 123 Utah 137, 256 P.2d 238 (1953)	15

AUTHORITIES CITED

12 Am.Jur.2d 922, Brokers §183

17 Am.Jur.2d 369, Contracts §31

17 Am.Jur.2d 378, Contracts §39

17 Am.Jur.2d 401, Contracts §62

74 Am.Jur.2d 597, Time §15

74 Am.Jur.2d 603, Time §20

169 A.L.R. 605: Right of Real Estate Broker,
Employed to Effect or Consummate Sale, to Compensation Where Principal Refuses or is Unable to Complete Transaction

STATUTES CITED

U.C.A. §68-3-7

U.C.A. §63-13-2

and Boley, a counter-offer of seven points was drawn up upon the stationery of Boley Realty. That document is attached to plaintiffs' Exhibit 2 as page 2. (T. 13). The document was dated January 11, 1977 and signed by Mr. and Mrs. Anderson. (T. 14). At the same time, the Andersons put an "X" through certain portions on the face of the original Earnest Money Receipt and Offer to Purchase. Mr. Anderson stated that the counter-offer took the place of the portion that had been crossed out, but that he agreed with all of the other terms of the original offer. (T. 14-15). Also on January 11, 1977, additional hand written terms to the counter-offer were added to the face of the original Earnest Money Receipt and Offer to Purchase which statement was also subscribed by the Andersons. That statement is really the key to this litigation and states as follows:

"Seller agrees to the terms above stated with the incorporation of the seven points outlined on the attached amendment sheet. Subject to buyers acceptance within five days.

Dated January 11 - 1977

A. M. Anderson
Nora S. Anderson" (P. Exhibit 2).

Mr. Bryce Taylor was present in the home of the Andersons when the counter-offers were signed and dated, and the documents were given to Mr. Taylor on January 11 to convey to the Norrises. (T. 29). Mr. Taylor was unable to convey the counter-offer to the Norrises until January 12. Finally, on January 14, 1977, the plaintiffs, through Kim Norris,

acceptance on the bottom of the second page of Exhibit 2.

That acceptance stated as follows:

"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.

Kim L. Norris
Jan. 14, 1977"

(P. Exhibit 2).

Taylor then called Hall and told Hall that he had a conditional acceptance of the counter-offer of the Andersons and that the parties needed to get another meeting together with the Andersons. Taylor, Hall and the Andersons met on the afternoon of Saturday, January 15, 1977. (T. 16-17, 30-31). The Andersons at the time were hurrying to a church meeting but the individuals did have a short meeting in which Anderson indicated that he was not anxious to delete the two items from his counter-offer but that, he would have to consider the matter. (T. 122). Taylor recalled that the parties had agreed to communicate again on Monday, the 17th of January, concerning the transaction, (T. 34), but Mr. Anderson stated that there was nothing definite said about any meeting on the 17th. (T. 17). In any event, the spirit of the meeting on Saturday, the 15th of January was that there may be some possibility of compromise and solving the differences between the parties. (T. 32-34).

On the morning of January 17, 1977, Dean Hall called Mr. Taylor and informed him that Anderson had decided to

stick with the original seven points rather than to compromise as had been discussed on Saturday. (T. 122).

Anderson denied that he told Hall on the morning of the 17th that he would have to stand by the original counter-offer but instead testified that his communication with Hall on the morning of the 17th was to the effect that the counter-offer had expired and that the deal would be off. (T. 19-20). However, Mr. Hall testified that when he called Anderson on the morning of the 17th to see how he felt about the two provisions, that the only thing Anderson said, was, "that in no way did he want to relinquish on either point". (T. 122). Immediately thereafter, Hall called Taylor and told him what Anderson had said. (T. 123).

On the morning of January 18, 1977, Mr. Taylor called Mr. Hall and told Hall that the Norrises had accepted the Andersons' counteroffer as originally written, including all seven points. (T. 35-36, 123-124). That telephone call by Taylor to Hall was initiated after Lanny L. Norris had written on the bottom of page two of Exhibit 2, the following words:

"The buyer accepts counter-offer as written.

Lanny L. Norris

January 18, 1977.

(P. Exhibit 2).

At the same time, Mr. Norris crossed out that portion of page 2 which had previously been written by Mr. Kim

Upon communicating to Hall that the Norris' had accepted the offer as written, Mr. Taylor requested that Hall and Taylor again meet with the Andersons to get their initials on the counter-offer. Hall told Taylor that Hall would call the Andersons and arrange the meeting. Hall called about 30 minutes later and told Taylor that Anderson was engaged the night of January 18, and would not be able to meet but that they could go to Anderson's place on the morning of January 19. (T 36).

The following morning, Taylor and Hall went to the Anderson home with Mr. Hall arriving some time prior to Taylor. As soon as Taylor arrived, he was told by Hall that Hall was presenting another offer from Mr. Boley to the Andersons and that the Andersons were considering that offer at that point. Some time thereafter, Mr. Paul Taylor, father of Bryce Taylor, also arrived at the Anderson home. (T. 37). Taylor had exhibit 2 with him at the meeting on top of his file or in his opened file which was on top of his briefcase. (T. 48). The meeting terminated when Mr. Anderson indicated that he was not accepting anyone's offer and refused further negotiations. Later, on the afternoon of the 19th, Kim and Lanny Norris visited with Anderson at which time Anderson told them that if they had accepted within five days, "they would have bought the place." (T. 24).

Mr. Bryce Taylor subsequently sent a completed copy of the Earnest Money Receipt and Offer to Purchase including page 2 as signed and modified by all of the parties to

the Andersons that was received by Mr. Anderson on February 17, 1977.

After trial of the matter, the court found that the offer originally submitted by the Norris brothers was rejected by the Andersons on January 11, 1977 at which time a counter-offer was made "subject to buyers acceptance within five days". The court also found that the "conditional acceptance" of the plaintiffs of January 14, was discussed by the parties, both through the real estate agents and at the meeting of January 15, between the Andersons, Hall and Taylor. The court found that there was no acceptance of the counter-offer at that meeting although there was some discussion that a solution to the problem of the right-of-way and the second mortgage provision may be had but that the Andersons wished to consider those matters further. There was also a finding that on the 17th of January, the Andersons advised Hall that they could not delete the two conditions and that the counter-offer as submitted was all the Andersons would accept.

The Court held that pursuant to Utah Code Annotated §68-3-8, the 16th of January being a Sunday was not counted so that the plaintiffs had through the 17th of January to accept the counteroffer of the defendants. There was a further finding that the "conditional acceptance" of the plaintiffs contained in the four lines which were crossed out on the second page of Exhibit 2 amounted to a rejection of the counter-offer, which could not, by a subsequent act

of the rejecting offeree, be accepted in the original form of the counter-offer. The Court made no specific findings or comments as to the second cause of action of the plaintiffs' complaint concerning the real estate commission but the Court dismissed both the first and second cause of action of the plaintiffs' complaint. (R. 34-36, 17-20).

It is the plaintiffs' contention that the trial court erred in failing to compel specific performance by the defendants and erred in failing to award a commission to the plaintiff, Taylor National Real Estate Company.

POINT I

THE TRIAL COURT ERRED IN FAILING TO COMPEL SPECIFIC PERFORMANCE.

The trial court based its decision to dismiss the first cause of action of plaintiffs' complaint, upon three premises:

(1) That the plaintiffs did not accept defendants' counter-offer within the time period required by the terms of the counter-offer;

(2) That the conditional acceptance of the plaintiffs was in reality a rejection of the counter-offer and a new offer and therefore, the original offer could not be subsequently accepted, and

(3) That there was no conduct on the part of defendants to either extend the five day period or that constituted a waiver of that limitation. (R. 17-20, 34-36).

The plaintiffs claim there was timely acceptance by them and that the Court should have compelled specific

performance.

Because of the various transactions between the parties, it is difficult to put a rigorous legal label upon each of the transactions so that it becomes a "offer", "counter-offer", etc. Plaintiffs submit, however, that the only logical interpretation of the actions of the parties is that there was an original offer submitted by the plaintiffs on January 7, 1977, which was rejected by the counter-offer of the defendants dated January 11, 1977. There was a conditional acceptance of the counter-offer on January 14, 1977, which conditional acceptance was, in fact, a counter-offer to the counter-offer. The defendants rejected the counter-offer or conditional acceptance by reaffirming or reinstating their original counter-offer. That reinstatement happened on January 17, 1977 and that reinstatement became a third counter-offer which was ultimately accepted on January 18, 1977. This characterization of the activities of the parties is supported by the general rules found at 17 Am Jur 2d, 378, Contracts, §39;

An offer is rejected by a counter-offer, and in this respect a qualified or conditional acceptance constitutes a counter-offer.

And, 17 Am. Jur. 2d 401 Contracts, §62:

"If a condition is affixed to the acceptance by the party to whom the offer is made, or any modification of or change in the offer is made or requested, there is a rejection of the offer which puts an end to the negotiation, unless the party who made the original offer renews it or assents to the modification suggested."

This general principle is supported by the case of Burton v. Coombs, 557 P.2d 148 (Utah 1976), which was so heavily relied upon by the defendants at trial. In that case, the plaintiffs asked the Supreme Court to compel the defendants to honor an acceptance of a settlement offer which was communicated to the defendants prior to trial, but which was rejected by the plaintiffs. Plaintiffs claimed that during the trial the offer was renewed and that the plaintiffs were therefore entitled to accept the offer of settlement and bind the defendants thereto. The court held, however, that there was no reinstatement of the offer by the defendants, and therefore, there was nothing to be accepted by the plaintiffs. In so holding, the Supreme Court implied that where there has been a reinstatement an offer after it has been rejected, it is susceptible to acceptance. The court stated:

Plaintiffs, by their words and expressly refusing the offer tendered at the beginning of trial and by their conduct in proceeding with litigation, effectively terminated the rights and liability of the parties to the proposed settlement. It was impossible for plaintiffs to assert acceptance at a later time unless defendants had expressly renewed their offer, and the record does not show that this was done.

In the present case there was a firm and absolute renewal of the counter-offer by the defendants on January 17, 1977, and the plaintiffs accepted the counter-offer on January 18, 1977.

The five day period was not expressly mentioned in the reinstatement of the counter-offer, but even if the five day

requirement was reinstated on the 17th with the renewal of the offer, the plaintiffs, of course, accepted within the five day period.

If the Court determines that the original counter-offer of January 11th is the controlling offer, then the plaintiffs' timely accepted in any event.

While the offer stated that it was "subject to buyers acceptance within five days", it did not state when the five day period commenced to run. The question is "within five days from what?"

While the counter-offer was signed and dated January 11, 1977, the five day period did not commence to run until the counter-offer was actually received by the purchasers. It is undisputed in the present case that the Norris' did not have a counter-offer in their hands until January 12, 1977. Since an offer is not considered made until it is actually received by the offeree, 17 Am.Jur.2d 369, Contracts §31, the condition that the purchaser accept "within five days" had no meaning until the offer was received by the Norrises. In other words, the Norrises were entitled to accept "within five days" after the offer was received by them.

It is general rule that when an act is required to be performed within a specified period of time, the rule is to exclude the first day and to exclude Sunday's, if the period of time is less than seven days. These rules are generally stated as follows:

Formerly, where a computation of time was to be made from an act done or from the time of an act, the day when the act was done was to be included. However, at the present time, both in the construction of contracts and statutes as well as in matters of practice when time is to be computed from a particular day or when an act is to be performed within a specified period from or after a day named, the rule is to exclude the first day and to include the last day of the specified period, except when a certain number of the entire days are required to intervene, in which case both the first and last days are excluded. In many jurisdictions, the rule excluding the first day and including the last is incorporated in statutes defining computation of time. Under the Federal Rules of Civil Procedure, in computing periods of time prescribed by order of court or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included, but the last day of the period so computed is to be included unless it is Sunday or a legal holiday. In the absence of anything showing an intention to count only "clear" or "entire" days, it is generally held that in computing the time for performance of an act or event which must take place a certain number of days before a known future day, one of the terminal days is included in the count and the other is excluded. However, a computation made by excluding both first and last days has frequently been employed, either as a general rule in some jurisdictions, or, in other jurisdictions, where it appears that there was an intention to count only "clear" or "entire" days.

In the absence of a controlling statutory provision, which fixes an absolute rule of computation, the courts will as a general rule adopt that construction which will uphold and enforce, rather than destroy, bona fide transactions and titles; whenever it is necessary to prevent a forfeiture or to effectuate the clear intention of the parties, the dies a quo will be included. Further, where it is provided that a certain result shall not accrue until after the expiration of a given number of days from a stated date, then both the first and last days must be excluded, so that the full number of days will be allowed.

74 Am. Jr. 2d 597, Time §15.

Where a limitation of time is fixed by statute within which an act is required to be performed, and the time stipulated for performance does not exceed a week, Sunday will be excluded in the computation of the time without an express statutory requirement to that effect; but when the time stipulated must necessarily include one or more Sundays, those days will not be excluded, in the absence of an express proviso for their exclusion. This general principle is held applicable to contracts, by a number of authorities, so that where an act is required to be done in a certain number of days exceeding a week, Sunday is included in the computations; but if the number of days is less than 7, Sunday is not counted.

74 Am. Jur. 2d 603, Time § 20.

This general rule is supported in Utah by statutes as follows:

U.C.A. 68-3-7, Time, how computed.

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 is also excluded.

U.C.A. 63-13-2 Legal Holidays-Governor Authorized to Declare Additional Days.

* * *

(2) For the period beginning with the effective date of this act, [Feb. 6, 1970], the following-named days are legal holidays in this state: every Sunday * * *

In the present case, the only days that would be counted would be January 13, 14, 15, 17, and 18. Since the plaintiffs' unqualified acceptance was communicated to the defendants on January 18, they are entitled to specific performance of the contract.

POINT II

THE PLAINTIFF, TAYLOR NATIONAL REAL ESTATE, IS ENTITLED TO A COMMISSION FOR FINDING A BUYER WHO WAS READY, WILLING AND ABLE TO PURCHASE.

The common way for a seller to employ real estate brokers to sell his property is to list the property with a multiple listing service, thereby giving the seller the benefit of the efforts of several brokers and agents. The relevant portions of the listing agreement currently used by the Utah County Board of Realtors, and the ones with which we are concerned in the present case are as follows:

In consideration of your agreement to list the property described herein and to use reasonable efforts to find a purchaser or tenant therefor, I hereby grant you for the period of six months from date hereof the exclusive right to sell, lease or exchange said property or any part thereof, at the price and terms stated hereon, or at such other price or terms to which I may agree in writing. During the life of this contract, if you find a party who is ready, able and willing to buy, lease or exchange said property or any part thereof, at said price and terms, or any other price or terms, to which I may agree in writing, or if said property or any part thereof is sold, leased or exchanged during said term by myself or any other party, I agree to pay you a commission of six percent for such sale, lease or exchange. Should said property be sold, leased or exchanged within six months after such expiration to any party to who the property was offered or shown by me, or you, or any other party during the terms of this listing, I agree to pay you the commission above stated.

* * *

In case of the employment of an attorney to enforce any of the terms of this agreement, I agree to pay a reasonable attorney's fee and all costs of collection.

You are hereby authorized and instructed to offer this property thru the Multiple Listing Service of the Utah County Board of Realtors.

* * *

The Courts of Utah have long recognized the general rule that under a listing agreement which requires a real estate broker to find a buyer who is ready, willing and able to buy, the broker is entitled to a commission when he finds such a buyer, even if the transaction is not actually consummated. Curtis v. Mortensen, 1 Utah 2d 354, 267 P.2d 237 (1954); Garff Realty Co. v. Better Buildings, Inc., 120 Utah 344, 234 P.2d 842 (1951); Reich v. Christopulos, 123 Utah 137, 256 P.2d 238 (1953); Ogden Savings Bank and Trust Co. v. Blakely, 66 Utah 229, 241 P.2d 1 (1925); Martineau v. Hanson, 47 Utah 549, 155 P.432 (1916).

In Curtis v. Mortensen, supra, the plaintiff real estate broker secured a six month listing agreement from the defendant seller which provided that if a buyer was found who was ready, willing and able to buy the property, a commission would be paid. A purchaser was found within the six month period and an earnest money agreement was signed by the salesman as agent for the buyers and was signed by the sellers. Thereafter, the sellers rescinded the earnest money agreement and attempted to rescind the listing agreement. The sellers refused to sell to the potential buyers and the deal collapsed. The broker brought an action to recover his commission under the listing agreement. The broker appealed from a trial court decision adverse to him and the Supreme Court reversed in his favor. The Court held:

The sale was never consummated because respondents changed their minds and refused to sell and not because the buyers refused to make a binding agreement. Under such circumstances appellants have fulfilled their part of the listing agreement by having produced purchasers who were ready, willing and able to buy the listed property and are entitled to their commission. Such were the terms of the listing agreement made by the parties. There was no requirement that a binding contract be entered into and for us to add that requirement would be to make a new contract for them. This we may not do. As stated in 8 Am. Jur. Sec. 184, page 1097:

"Once the broker has procured a person who is able, ready and willing to purchase on the terms offered by the owner, he is entitled to commission, even though the failure to complete the contract is due to the default or refusal of the employer."

This court in Little and Little v. Fleishman, 35 Utah 566, on page 568, 101 P. 984, on page 984, 24 L.R.A., N.S., 1182, indicated it was in accord with the above statement, even though it was unnecessary to a decision of that case since a binding offer had been obtained by the owner, by saying:

"* * * The substantial features of the agreement between plaintiffs and the defendant are that the plaintiffs were employed to effect, not consummate, a sale, and were entitled to a commission in the event of a sale at any price agreed upon. When the plaintiff obtained and produced a purchaser who was able, ready and willing to purchase for the price, and on the terms proposed they did all that was required to them, and the owner could not, under the terms of his contract with them, arbitrarily refuse to sell and decline to enter into negotiations of a sale with the proposed purchaser without becoming liable to plaintiffs for their commission."

See also Hoyt v. Wasatch Homes, Utah, 261, P.2d 927, Down v. DeGroot, 83 Cal, App. 115, 256 P.438 and Peeler v. Bean, Tex. Civ. App., 38 S.W. 2d 395.

In a similar factual setting, the Court in Garff Realty Co. v. Better Buildings Inc., supra, at 843, held that where a real estate broker procured the signature of a purchaser on an earnest money receipt and agreement for purchase, there was legal consideration for the promise of the vendor to pay a commission to the broker and the broker was entitled to recover the commission.

There are a host of cases in which it has been recognized that the right to compensation on the part of a real estate broker employed to effect a sale of property who has produced a person ready, able and willing to purchase the property upon the terms stipulated in the brokerage listing agreement, it not lost by a failure of completion of the transaction, where such failure is due to the refusal of the seller to go through with the sale. Curtis v. Mortensen, supra, 169 A.L.R. 605: Right of Real-Estate Broker, Employed to Effect or Consummate Sale, to Compensation Where Principal Refuses or is Unable to Complete Transaction; 12 Am. Jur. 2d 922, Brokers §183 and cases cited therein.

This Court has recognized that where a broker, employed to effect the sale of real estate, obtains a written earnest money agreement containing the terms of sale as agreed upon in the listing agreement signed by a prospective purchaser who is ready, able and willing to perform upon the terms agreed upon, the contract on the part of the broker is

the owner's refusal to go through with the transaction. In Hoyt v. Wasatch Homes, 1 Utah 2d 9, 261 P.2d 927 (1953), a broker obtained the signature of a purchaser on the usual printed form Earnest Money Receipt and Agreement which recited the terms of sale contained in the listing agreement, with the agreed down payment. After a series of negotiations, the sellers refused to sell to the prospective buyers on the terms of the listing agreement. Thereafter, the sellers brought an action against the broker to recover money which he had kept as commission for arranging the sale. The Court, on an appeal by the defendant-broker from a judgment adverse to him in the trial court, held that the broker was entitled to his commission.

[2] That agreement certainly contemplated that the plaintiff would cooperate in good faith toward the accomplishment of the purpose for which he employed defendant. He cannot be permitted to procure them to obtain a buyer, on terms accepted by the plaintiff, and then prevent the accomplishment of what he requested and authorized them to do by arbitrarily refusing to perform his part of the transaction. Under such circumstances, he will not be heard to complain of their failure to do that which he prevented. (Citing cases and 169 A.L.R. 605). Hoyt v. Wasatch Homes, supra, at 930.

And in the recent case of Davis v. Health Development Company, 558 P.2d 594 (Utah, 1976) the Court reaffirmed this rule by saying:

Plaintiff Davis's Claim of Commission

[5] Plaintiff Davis makes the argument that the plan submitted for obtaining financing and the purchase by Mrs. Housely and Mrs. Brinton fulfilled his obligation under the listing contract to obtain a ready, willing

and able buyer, wherefore, he should be entitled to his commission. He supports this argument if an agent so performs, and the sale is not completed because of lack of cooperation or obstruction by the listor (the defendant corporation), the agent is nevertheless entitled to his commission.

Plaintiffs submit that the cases of Curtis, Hoyt, and Davis clearly state the rule that a real estate broker is entitled to commission, regardless of the enforceability of any agreement between the vendor and the purchaser, if the broker produces a ready, willing and able buyer who is prevented from purchasing by an act of the vendor.

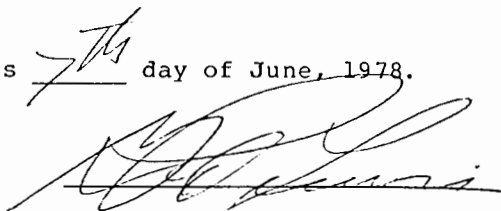
In the present case, it was the erroneous conclusion by Mr. Anderson that the time for acceptance had expired, coupled with the offer by Mr. Boley to purchase the property that caused the Andersons to refuse to consummate the deal. In fact, when the Norrises met with Anderson on the 19th of January, he told them that if they had accepted the offer within five days they would have bought the place. (T. 24). Clearly the refusal to sell was the decision of the Andersons, Hall, and Boley and not the Norrises. The plaintiff, Taylor National Real Estate, is consequently entitled to a commission of six percent (6%) on the proposed purchase price of \$250,000.00.

CONCLUSION

The plaintiffs, LKL Associates, timely accepted the renewal of the defendants' offer, thereby entitling them to specific performance. It was the miscalculation of the Andersons and the advice and offer of Boley Realty that

prevented the sale from culminating. The plaintiff should not be prevented from a legitimate purchase by the actions of the sellers and their realtor. For these same reasons, the plaintiff, Taylor National Real Estate is entitled to its duly earned commission.

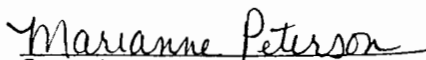
Respectfully submitted this 7th day of June, 1978.



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MAILING CERTIFICATE

I hereby certify that on the 7th day of June, 1978, I mailed two copies of the foregoing Brief of Appellant to V. Pershing Nelson, Attorney for Defendants-Respondents, at 43 East 200 North, Provo, Utah, 84601.


Secretary