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Walker Reality, Calvin Florence v. John E. Runyan,
Esq. Air Freight Inc., E. Dean Shelledy Mt.
Olympus Associates, Shelter Inc., Bettilyon Realty,
Inc. : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

FEB 1976

YOUNG UNIVERSITY
J. Reuben Clark Law School

WALKER REALTY and
CALVIN FLORENCE,

Plaintiffs and Appellants

vs

JOHN E. RUNYAN, ESQ.
AIR FREIGHT INC.,
E. DEAN SHELLDY
MT. OLYMPUS ASSOCIATES,
SHELTER, INC. and
BETTILYON REALTY, INC.

Defendants and Respondents.

Case No. 14121

BRIEF OF APPELLANTS

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IN THE SUPREME COURT OF THE STATE OF UTAH

WALKER REALTY and
CALVIN FLORENCE,

Plaintiffs and Appellants

vs

JOHN E. RUNYAN, ESQ.
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E. DEAN SHELLDY
MT. OLYMPUS ASSOCIATES,
SHELTER, INC. and
BETTILYON REALTY, INC.

Defendants and Respondents.

Case No. 14121

BRIEF OF APPELLANTS

STATEMENT OF THE NATURE OF THE CASE

The plaintiff-appellant (hereinafter referred to as the plaintiff), Calvin Florence, and the defendant-respondent (hereinafter referred to as the defendant), John E. Runyan, entered into an oral finders agreement, later confirmed by memoranda. The plaintiff was to find and introduce a ready, willing and able buyer to the defendant in return for a finders fee of \$50,000 and delivery of apartment 3507 of the Banyan Tree Plaza with a \$25,000 mortgage. The plaintiff performed and the defendant refused to perform and to meet his obligations. The plaintiff brings this action to obtain specific performance, damages and such relief as the court deems just and equitable.

PROCEDURAL BACKGROUND

Defendant's motion for summary judgment was granted by the lower court on the 22nd day of April, 1975. However, following stipulation and agreement by and between the attorneys for both parties, entered on the grounds that plaintiff's original attorney of record had been ill in the hospital and therefore unable to attend to the matter, the lower court's order granting summary judgment was vacated. Plaintiff's present attorney then took over the case and a hearing was held May 9th 1975. On May 15th 1975 defendant's motion for summary judgment as to Counts I and II of plaintiff's second amended complaint was granted. The lower court also granted summary judgment as to Counts III and IV by stipulation of counsel. On the 22nd day of May 1975 the plaintiffs filed their notice of appeal.

RELIEF SOUGHT ON APPEAL

Plaintiffs seek to have the lower court's order granting the defendant's motion for summary judgment reversed and to have the matter returned to the lower court for trial.

STATEMENT OF FACTS

The plaintiff, Calvin Florence, entered into an oral finders agreement with the defendant, John E. Runyan. The oral agreement was evidenced by written memoranda dated March 18th 1974 and October 18th 1974. The plaintiff was to find and introduce to the defendant a ready, willing and able buyer for the defendant's property in return for which introduction a finders fee was to be paid by the defendant. The plaintiff performed his obligation as agreed by finding and introducing a ready, willing, and able buyer. The defendant refused to perform and pay the plaintiff for "services rendered."

POINT I

THE LOWER COURT ERRED IN GRANTING SUMMARY JUDGMENT IN THAT MATERIAL ISSUES OF FACT IN CONTROVERSY EXIST IN THE RECORD.

Plaintiff contends that the oral finders agreement entered into with the defendant is set

forth in the letter of John E. Runyan written October 18th 1974, attached to the Affidavit of plaintiff Calvin Florence dated January 6th 1975.

“This will confirm that I will pay Cal Florence \$25,000 for services rendered in conjunction with this sale and deliver to him apartment 3707 in the Banyan Tree Plaza in Honolulu, subject to the present outstanding mortgage indebtedness of approximately \$25,500.00.”

This final written expression of the oral finders agreement, with its fee reduced by mutual agreement, expresses the terms of the oral agreement, the plaintiff’s “services” having already been “rendered.”

On the other hand the defendant, in his affidavit, relies upon the language of the March 18th 1974 memorandum, also attached to the affidavit of the plaintiff Calvin Florence, which expresses that the finders fee “is contingent upon the ultimate completion and delivery of the building as per the stock sales agreement . . . which if for any reason fails to materialize, no portion of the finders fee will be paid.” Hence a material issue of fact in controversy exists in the record and the plaintiff strenuously contends that the lower court erred in granting summary judgment in light of the existence of such controversy.

POINT II

THE AGREEMENT IN CONTROVERSY WAS A FINDERS AGREEMENT NOT A BROKERAGE CONTRACT AND THEREFORE DOES NOT FALL WITHIN THE PURVIEW OF THE STATUTE OF FRAUDS.

Although the defendant, in his memorandum in support of motion for summary judgment, argued that the agreement in controversy was a brokerage contract and was therefore unenforceable under the statute of frauds, it is clear from the Record (see letter of John E. Runyan to Calvin Florence March 18th 1974 and Affidavit of John E. Runyan P. 11 March 27th 1975) that the agreement was a finders fee agreement and therefore not within the purview of the statute of frauds.

The distinction between broker and finder is clearly drawn in the case of *Palmer v. Whaler*, 285 P.2d 8 (Cal 1955), where finders are defined as those who make introductions between buyer and seller, while brokers or dealers are those who engage in actual negotiations and are agents who perform substantive acts for the seller. The court in *Palmer* held that “finders agreements and finders fees do not fall within the purview of the Statute

of Frauds” (ibid at 12). (See also *Freeman v. Jergins*, 271 P.2d 210 (Cal 1954) for a recent case of *Tyrone v. Kelley*, 507 P.2d 65, at 69, 70 (Cal 1973) for lengthy list of cases on this point.)

Thus the plaintiff strenuously contends that if summary judgment was granted by the trial court in a belief that the agreement in controversy was a brokerage agreement which fell within the purview of the Statute of Frauds, said court was in error.

POINT III

EVEN IF IT APPLIED THE STATUTE OF FRAUDS MAY NOT BE INVOKED TO PERPETRATE A FRAUD OR GROSS INEQUITY.

The plaintiff fully performed his duties toward the defendant under the finders agreement by introducing the defendant to a buyer ready willing and able to buy, (with whom defendant later entered into business transaction). In the language of the court in *Welchman v. Wood*, 9 Utah 2d 25 (1959) “. . . full performance would eliminate any application of the Statute of Frauds, because (sic) it may not be invoked to perpetrate a fraud or gross inequity” (at 28). (See also *Ravanno v. Price*, 123 Utah 559 (1953) and *Chadwick v. Arnold*, 34 Utah 48 (1909). The very nature of a “finders” function exposes the finder to the very real danger of being denied his just fee by buyers and sellers who may agree to circumvent their having to pay the “finder” his fee by lease or deferred payment arrangements. Policy demands that such buyers and sellers should not be permitted to take refuge behind the Statute of Frauds to further bolster their breach of the finders agreement and deny “finders,” like the plaintiff, their just remuneration when they provide ready, willing and able buyers (see *Winkelman v. Allen* 519 P.2d 1377 (Kansas 1974)).

Thus, even if the Statute of Frauds were to apply to the agreement in controversy, which the plaintiff denies, the lower court was in error if it granted summary judgment on that basis because plaintiff has fully performed and thereby satisfied the proviso enunciated by *Welchman, supra*.

POINT IV

SUFFICIENT MEMORANDA EXIST IN THE RECORD TO TAKE THE TRANSACTION OUTSIDE OF THE PURVIEW OF THE STATUTE OF FRAUDS EVEN IF THE AGREEMENT IN CONTROVERSY WERE TO BE REGARDED AS A BROKERAGE AGREEMENT RATHER THAN A FINDERS AGREEMENT.

The record contains sufficient memoranda to the agreement in controversy to wit; letter of John E. Runyan to Dean Shelledy, October 18th 1974, Affidavit of Calvin Florence January 6th 1975 and Affidavit of John E. Runyan March 27th 1975—to meet the requirements defined by the court in *Ney v. Harrison*, 5 Utah 2d 217, 222, 223, (1956) as necessary to take the agreement beyond the purview of the Statute of Frauds § 25 - 5 - 4(2). U. C. A. 1953.

Indeed almost any kind of writing is sufficient if it is signed by the defendant and contains the essential terms of the agreement (see *Fritsch v. Hess*, 49 Utah 75 (1916)). Thus, both from the material facts found in the record and under the statute itself, the defendant cannot invoke the Statute of Frauds to defeat the plaintiff's claim and the lower court again erred in granting summary judgment on this ground.

POINT V

PLAINTIFFS SECOND AMENDED COMPLAINT, ALTHOUGH NOT ARTFULLY DRAFTED BY PLAINTIFFS ORIGINAL ATTORNEY, STATES A VALID CAUSE OF ACTION SUPPORTED BY PLAINTIFFS AFFIDAVIT THUS SATISFYING THE REQUIREMENTS OF RULE 56 (e) U.R.C.P. AND PRECLUDING SUMMARY JUDGMENT.

The plaintiff's second amended complaint drafted by plaintiffs original attorney states a valid cause of action in that all the necessary details of the events surrounding the formulation of the finders agreement, supported by affidavit, are fully stated together with the plaintiff's allegations concerning his full-performance, allegations of the defendants nonperformance, and prayer for relief.

It is the substance, not the form or artfulness that governs the sufficiency of such a claim under our notice pleading system. (see *Scott v. City of Indian Wells*, 492 P.2d 1137 (Cal 1972), *Stewart v. Arrington Construction Company*, 446 P.2d 895 (Ida 1968)). Utah has traditionally exhibited great liberality in construing assailed pleadings eg. *Harman v. Yeager*, 100 Utah 30, 110 P.2d 357 (Utah 1941).

Indeed, a petition containing necessary allegations to advise the defendant of the claim against him and of the relief sought is deemed sufficient, although stated in an awkward and unskilled manner. *Cooley v. Shepherd*, 225 P.2d 75 (Kansas 1950). Further, the defendant's motion for summary judgment was tantamount to a motion to dismiss and could have been sustained only if the allegations of the petition clearly demonstrated that the plaintiff did not have a claim for relief, *Woolums v. Simousen*, 522 P.2d 1321 (Kansas 1974). *Continental Insurance Company v. Windle*, 520 P.2d 1235 (Kansas 1974). As Utah case law indicates a decision to grant summary judgment should only be granted when under the facts viewed in the light most favorable to the plaintiff, and with every doubt resolved in the plaintiff's favor, the plaintiff could not recover as a matter of law. (see *Welchman v. Wood*, 9 Utah 2d 25, 28 (Utah 1959).

Thus the plaintiff's second amended complaint is sufficient and for the lower court to grant defendant's motion for summary judgment was error.

CONCLUSION

The plaintiff strenuously contends that on the basis of the material facts in controversy in the record and from the legal points argued *supra*, that the lower court erred in granting the defendant's motion for summary judgment and that this court should reverse the lower court's order and return this matter to the lower court for trial.

Respectfully Submitted,

ROBERT J. DEBRY

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and Appellant'