

2001

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

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

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WALKER REALTY and
CALVIN FLORENCE,

Plaintiffs and Appellants

vs

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

Defendants and Respondents.

Case No. 14121

REPLY BRIEF

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REPLY BRIEF

POINT I

UTAH CASE LAW SUPPORTS PLAINTIFFS CONTENTION THAT FINDERS AGREEMENTS DO NOT FALL WITHIN THE STATUTE OF FRAUDS.

Plaintiff's Brief cited *Palmer v. Whaler*, 285 P.2d 8 (Cal 1955) as authority for the proposition that a finders agreement does not fall within the purview of 25-5-4(5) of the Utah Code. Defendant's brief bitterly attacked that California case and concluded that "it now stands as no more than a lifeless relic . . . the case is dead." *Brief of Respondants* p. 6.

Although this court has not ruled on that precise point, it has ruled on the analagous issue of whether or not a contract to procure a lease fell within §25-5-4(5) of the Utah Code. The case of *Wooley v. Wycoff*, 2 Utah 2d 329 concluded that,

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"Although it may be that there is as good reason why the Legislature should have included agreements for rental of property in the statute requiring such

agreements to be in writing, as there is for a sale, they did not do so. They announce the policy; we interpret it. For us to interpret the statute that the words 'purchase or sell' are equivalent to 'rental' is 'inconsistent with the manifest intent***' expressed by the statute and would amount to extending it by judicial legislation.

The court's reasoning is analagous to the case at bar. This court should not extend the clear and unambiguous mandate of the legislature to cover finders agreements.

POINT II

DEFENDANT, AS THE MOVING PARTY, HAS THE BURDEN TO SHOW THAT THERE IS NO GENUINE ISSUE OF MATERIAL FACT.

Defendant's brief assailed the short affidavit of plaintiff Calvin Florence by saying, "Appellants failed to show any issue of material fact, and the trial court had no choice but to grant summary judgment to the defendants . . . if appellants failed to submit sufficient evidence under Rule 56(e) to warrant a trial on the matter, it is not the fault of Respondants."

Defendant wrongfully assumes that Rule 56(e) places the burden on plaintiff to show that there is no fact issue. In analyzing an identical statute the Kentucky Supreme Court has reasoned that,

"The operation is, however, *somewhat different where the motions are made by the opponent of the party with the trial burden*. Assume, for example, that the movant is the defendant who is attacking the merits of plaintiff's claim. On motion for directed verdict the party resisting the motion, *i.e.*, the plaintiff, has had to and has presented his evidence, which is then scrutinized by the motion. On motion for summary judgment by a defendant on the ground that plaintiff has no valid claim, the defendant, as the moving party, has the burden of producing evidence, of the necessary certitude which *negatives* the opposing party's (plaintiff's) claim. This is true because the burden to show that there is no genuine issue of material fact rests on the party moving for summary judgment, whether he or his opponent would at trial have the burden of proof on the issue concerned; and rests on him whether he is by it required to show the existence or non-existence of facts." (Emphasis added.) 6 Moore's *Federal Practice* par. 56.15[3], p. 2341 (2d ed. 1966)". *Barton v. Gas Service Company*, 423 S.W. 2d 902 (Ky 1968). See also *Adickes v. S. H. Kress & CO.*, (1970) 398 U.S. 144.

Not only does the moving party have the burden of proof, he has a particularly heavy burden. In construing an identical statute the Texas Supreme Court has held that,

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The two quotations illustrate a basic fallacy frequently found in the approach

judgment in favor of a defendant. In such cases, the question on appeal, as well as in the trial court, is *not* whether the summary judgment proof *raises fact issues* with reference to the essential elements of a plaintiff's claim or cause of action, but is whether the summary judgment proof *establishes as a matter of law that there is no genuine issue of fact* as to one or more of the essential elements of the plaintiff's cause of action." *Gibbs v. General Motors Corporation*, 450 S.W.2d 827 (Texas 1970).

The foregoing legal analysis is important for it shows that it is the defendant's affidavit which must be placed under the microscope. The adequacy of plaintiff's affidavit is no issue until after the moving party's affidavit "establishes as a matter of law that there is no genuine issue of fact."

Defendant's affidavit failed to meet this burden in any number of instances. For example, plaintiff's complaint raises the issue of bad faith. A bad faith refusal to sell will not defeat a claim for a commission by one who has procured a buyer who is ready, willing and able to buy. *Lindsey v. Cranfill*, 297 P.2d 1055 (N.M. 1956). Defendant's affidavit did not show as a matter of law that there was no genuine issue of fact on the question of bad faith.

Since defendant, as moving party, had the burden of proof, it was not necessary for plaintiff to put in affidavit-evidence on the issue of bad faith. Plaintiff's affidavit was short only because defendant did not meet his burden on the many issues raised by the pleadings.

CONCLUSION

Utah case law supports the proposition that finders agreements are not barred by the Statute of Frauds. In any event defendant has failed to show as a matter of law that there is no genuine issue of fact for the trial court. The lower court's award of summary judgment on counts I and II of plaintiff's Second Amended Complaint should be reversed. The award of summary judgment as to Counts III and IV was by stipulation and need not be disturbed.

Respectfully Submitted,

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