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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 Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

BYU YOUNG UNIVERSITY
J. REUBEN CLARK LAW SCHOOL

WALKER REALTY and
CALVIN FLORENCE,

Plaintiffs and
Appellants,

vs.

Case No. 14121

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

Defendants and
Respondents.

BRIEF OF RESPONDENTS

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SEP 18 1975

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IN THE SUPREME COURT OF THE STATE OF UTAH

WALKER REALTY and
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SHELTER, INC., and
BETTILYON REALTY, INC.,

Defendants and
Respondents.

BRIEF OF RESPONDENTS

STATEMENT OF THE NATURE OF THE CASE

This is an action brought to recover a broker's commission allegedly owing to the Plaintiffs-Appellants from the Defendants-Respondents.

DISPOSITION IN LOWER COURT

Defendants' motion for summary judgment was heard by the Honorable Stewart M. Hanson, Jr. Upon hearing argument of counsel and examining the pleadings on file, the court granted Defendants' motion for summary judgment as to Counts I and II of Plaintiffs' Second Amended Complaint. Counsel for

the parties stipulated before the court that summary judgment as to Counts III and IV of Plaintiffs' Second Amended Complaint should be granted against Plaintiffs.

WALTER REEDY AND
CALVIN FLORENCE

RELIEF SOUGHT ON APPEAL

Defendants-Respondents seek affirmance of the judgment of the trial court.

STATEMENT OF FACTS

On or before March 18, 1974, Plaintiffs-Appellants (hereinafter referred to as "Appellants") and Defendants-Respondents (hereinafter referred to as "Respondents") entered into an oral brokerage agreement for the sale of real estate, which agreement was subsequently confirmed by a letter from John E. Runyan dated March 18, 1974 (R.41). The agreement specifically provided that the broker's commission was contingent upon the ultimate completion and delivery of the building as provided for in the written agreement between Respondents dated March 18, 1974 (R.44). The uncontroverted affidavits of Respondents established that the building was not delivered as provided and Appellants were, therefore, not entitled to the contingent broker's commission (R.50, 55-6). Subsequent to that date, the parties discussed another agreement for the sale of the building in question. John E. Runyan sent E. Dean Shelledy an offer by letter dated October 18,

1974 (R.42-3), providing that Appellants were to receive a broker's commission should the contract be accepted by Shelledy. The uncontroverted affidavits of Respondents established that this offer was never accepted by Shelledy and Appellants were, therefore, not entitled to any broker's commission (R.50-1).

Appellants then brought this action to recover a broker's commission on the proposed transactions, based upon the letters and proposed contract cited hereinabove and upon an alleged oral brokerage agreement (R.32, p2).

ARGUMENT

Point I

THE DECISION OF THE TRIAL COURT WAS PROPER
FOR THE REASON THAT THERE WERE NO DISPUTED
ISSUES OF MATERIAL FACT.

It is evident from the record before the trial court that there were no disputed issues of material fact before that court. Appellants have completely misinterpreted the meaning and significance of John E. Runyan's letter of October 18, 1974 (R.42-3). The letter on its face is simply an offer -- an offer to modify the previously abandoned agreement. The third paragraph of the letter makes this clear, referring to several conditions upon which Shelledy's "acceptance is contingent". It is further significant that the offer contains space for an acceptance by Shelledy, which space is vacant. The offer was not accepted, as shown by the

lack of Shelledy's signature on the agreement, and by the uncontroverted affidavit of John E. Runyan (R.50-1) which states that the letter of October 18, 1974, was simply an offer that was never accepted.

There is no disputed issue of material fact in this case. The agreement stated in the letter of March 18, 1974 (R.44), is clearly contingent, and the contingency failed to materialize. The letter of October 18, 1974, is nothing more than an offer that was never accepted. There is no conflict between the two documents. The uncontroverted affidavits of the Respondents make that clear -- protestations of the Appellants in their Brief notwithstanding.

Point II

THE STATUTE OF FRAUDS DOES NOT DISTINGUISH BETWEEN "BROKERAGE" CONTRACTS AND "FINDER'S FEE" CONTRACTS, AND THIS CASE FALLS SQUARELY WITHIN ITS PROVISIONS.

Notwithstanding the claims made by Appellants at Point II of their Brief, the Utah Statute of Frauds does not differentiate between finder's fee and brokerage agreements. The case cited by Appellants of Palmer v. Wahler, 133 Cal.App.2d 705, 285 P.2d 8 (1955), does not support Appellants' claim. In that case the court determined that the conflict in question dealt with chattels and not with "real estate" within the meaning of the Statute of Frauds (Id. 12-13). Therefore, any language relating to finder's fees and sales of real estate is rendered mere obiter dictum.

Additionally, the case is easily distinguished. First, the Utah Statute of Frauds at §25-5-4, U.C.A., is substantially different from the California Statute of Frauds found at Deering's California Codes, §1624, which is phrased differently and includes leases and short-term sales which the Utah statute does not. Secondly, Appellants have misinterpreted the holding of the Palmer case, supra. The court in Palmer interpreted the law to read that an oral brokerage agreement for the sale of real estate was valid, in spite of the Statute of Frauds, if the finder was not a licensed agent or broker. The plaintiff in Palmer recovered his fee only because he was not a licensed broker. In other words, the "exception" alluded to by Appellants was not a finder's fee exception, but rather a non-broker fee exception.

The present case is clearly and easily distinguished from Palmer for the simple reason that Appellants in the present case admittedly are licensed real estate brokers (R.32) and, thereby, do not meet the requirement of the non-broker fee exception. This interpretation of Palmer is borne out by a reading of the subsequent decision of Porter v. Eirod, Inc., 51 Cal. 784 (1966),

Commentators have accepted the Palmer case as establishing that a finder's agreement with an unlicensed finder is not within the contemplation of the Statute of Frauds. Id. 787.

The situation created by the Palmer case and the judicial precedent it set were unique to California during the period from 1955 to 1967, and the situation has been described in at least one recorded instance as an "anomaly" (Hasekian v. Krotz, 74 Cal. 410, 413 (1969)). Not only does the Palmer case deal with a unique interpretation of a unique situation, but the decision is totally irrelevant to the present case since Appellants are both licensed brokers. Not only this, but the California Legislature was evidently so shocked by the Palmer decision that it completely erased its inequitable consequences in 1967 by amending the statute in question. As stated in Krotz, supra, 413 n. 4:

In 1967, the Legislature put an end to this anomaly by further amending Civil Code Section 1624, subdivision 5, by adding the words "or any other person", with the result that now a finder's agreement by whomsoever made must be in writing. (Emphasis added.)

Palmer was a unique decision based on a grossly inequitable interpretation of statute, and the California Legislature effectively removed it from the annals of judicial precedent. It now stands as no more than a lifeless relic, and Appellants have unfortunately dredged it up and misinterpreted its vitiated rule of law. The case is dead; and even if it were alive, it would be irrelevant since the Appellants are licensed brokers.

POINT III

THE ALLEGED BROKERAGE CONTRACT HAS NOT BEEN FULLY PERFORMED, AND APPLICATION OF THE STATUTE OF FRAUDS DOES NOT THEREFORE PERPETRATE A FRAUD OR GROSS INEQUITY.

Appellants claim at Point III of their Brief that on the basis of the Utah decision of Welchman v. Wood, 9 Ut.2d 25, 337 P.2d 410 (1959), it would be a fraud or a gross inequity to invoke the Statute of Frauds. Such reliance on the Welchman case is not soundly based. In Welchman, supra, the court dealt with a situation where the broker had been paid his commission and the brokerage contract was fully performed. A more exact look at the language quoted by Appellants at Page 4 of their Brief substantiates this.

. . .the plaintiffs have fully performed by paying the commission, which 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. Id. 411.

The statement in the Welchman case that the Statute of Frauds may not be invoked "to perpetrate a fraud or gross inequity" is clearly in reference to the rule that where a realty owner has fully executed and ratified an oral brokerage contract by paying the broker his full commission, it would be grossly inequitable to then allow that same property owner to deny the contract. The rule is sound, but in the present case it is irrelevant.

Appellants mistakenly argue that "the lower court was in error if it granted summary judgment on that basis / Statute of

Frauds⁷ because plaintiff has fully performed. . . ." (Appellants' Brief, 4). This is not the way the rule works. To so interpret the Welchman rule is to render the Statute of Frauds inoperative, since in every case where a broker petitions the court for a commission he has "fully performed" his part of the transaction. The "full performance" rule enunciated in Welchman applies only where the entire contract has been fully performed and the commission has been paid.

In the present case we clearly do not have a situation where the broker's commission has been paid (R.34, p10), and the Welchman rule is inapplicable. A cursory examination of the other cases cited by Appellants (Ravarino v. Price, 123 Ut. 559, 260 P.2d 570 (1955); and Chadwick v. Arnold, 34 Ut. 48, 95 P. 527 (1909)) discloses that those decisions are completely irrelevant to the facts before this court as neither case deals with oral brokerage agreements. Here, again, the exception to the Statute of Frauds cited by Appellants is inapplicable to the uncontroverted facts of the present case.

Point IV

THE RECORD LACKS SUFFICIENT MEMORANDA TO TAKE
THE ALLEGED BROKERAGE TRANSACTION OUTSIDE THE
PURVIEW OF THE STATUTE OF FRAUDS.

The documents cited by the Appellants as "sufficient memoranda" of the alleged oral brokerage agreement are not sufficient by any standards. The letter of March 18, 1974, clearly

sets forth that payment of any fee is contingent upon certain conditions. These conditions were not met, and the letter of October 18, 1974, is not a memorandum of a contract but is merely an offer to contract which was not accepted according to the uncontroverted affidavits of John E. Runyan and E. Dean Shelledy. The affidavits themselves are clearly not sufficient memoranda. If anything, they stand in support of Respondents' position that the alleged contract terms were not met in the first instance (March 18, 1974) and not accepted in the second instance (October 18, 1974).

The problem Appellants are faced with can be ascertained by a reading of one of their cited cases, Fritsch v. Hess, 49 Ut. 75, 162 P. 70 (1916).

. . .almost any kind of writing will be sufficient if it be signed by the party sought to be charged and contains the essential terms of the contract. Id. 71.
(Emphasis added.)

The contract terms essential to the recovery of a broker's commission by the Appellants are simply not present in any writings signed by Respondents.

Point V

APPELLANTS MAY NOT REST UPON THE BARE ALLEGATIONS OF THEIR SECOND AMENDED COMPLAINT WHEN FACED WITH A MOTION FOR SUMMARY JUDGMENT, AND THE JUDGMENT OF THE TRIAL COURT WAS CORRECT AND PROPER.

Appellants have mistakenly presumed at Point V of their Brief that "defendant's motion for summary judgment was tantamount

to a motion to dismiss" (Appellants' Brief, 6). The claims made by Appellants notwithstanding, Rule 56(e) of the Utah Rules of Civil Procedure is not satisfied solely by Appellants' Second Amended Complaint and the Affidavit of Calvin Florence, primarily because Florence's affidavit does not dispute any issues of material fact. It simply states that Florence received certain letters from John E. Runyan, copies of which were attached to the affidavit. This is clearly insufficient. Rule 56(e) states, in pertinent part, as follows:

When a motion for summary judgment is made and supported as provided by this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response. . . must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him. (1974 supp.)

Appellants did not present to the trial court any evidence or testimony in any form whatsoever disputing the affidavits filed by Respondents. This being the case, Appellants failed to show any issue of material fact, and the trial court had no choice but to grant summary judgment to the Defendants. Appellants apparently (and wrongfully) place reliance on an irrelevant Kansas case as the basis of their claim. At Page 6 of their Brief, they state,

. . . Defendant's motion for summary judgment. . . could have been sustained only if the allegations of the petition clearly

demonstrated that the plaintiff did not have a claim for relief. . . . Continental Insurance Company v. Windle, 520 P.2d 1235 (Kan. 1974).

The case cited by Appellants makes no such holding.

Windle dealt with a situation where there were no affidavits or memoranda on file, no sworn testimony, and no evidence.

The record before us consists only of plaintiff's petition and defendant's motion for summary judgment; thus, our review is limited to consideration of the allegations of the petition. Id. 1237.

In the present case, the trial court's decision was based on consideration of the Plaintiffs' Second Amended Complaint; the letter of March 18, 1974; the letter of October 18, 1974; the Affidavit of Calvin Florence (R.70); the Agreement dated March 18, 1974; the Affidavit of E. Dean Shelledy; the Affidavit of John E. Runyan; the Stipulation to Judgment in Civil Case No. 220511 (R.53); and the memoranda filed by counsel (R. 21, 57). The court was entitled to consider all the testimony and exhibits before it, and if Appellants failed to submit sufficient evidence under Rule 56 (e) to warrant a trial on the matter, it is not the fault of Respondents. The material facts presented to the trial court by Respondents were uncontroverted by the Appellants and the court rightfully determined that Appellants could not recover as a matter of law.

Point VI

THE SCOPE OF APPELLATE REVIEW HEREIN APPLICABLE HAS BEEN SIGNIFICANTLY RESTRICTED BY THE PLAINTIFFS-APPELLANTS DUE TO THE FACTS AND CIRCUMSTANCES OF THE CASE.

The scope of appellate review in the present case is significantly restricted by the stipulation entered into by the Appellants in the lower court proceedings. It was there stipulated at the time of hearing Defendants' motion that said motion should be granted as to Counts III and IV of the Second Amended Complaint (R.83). Since the order of the court concerning Counts III and IV was based upon stipulation by the Appellants, they are thereby precluded from appealing the decision as it relates to those two counts. 5 Am.Jur.2d, Appeal and Error, §711 (1962).

The scope of appellate review is further restricted by an important legal presumption -- one which Appellants have failed to rebut.

The scope of appellate review is largely influenced by a number of rebuttable presumptions, pre-eminent among which is that which, at least where the decision has been rendered by a court of record or a court of general jurisdiction, assumes the correctness of the decision or ruling appealed from and the regularity of the proceedings below. Thus, every reasonable intendment favorable to a ruling of the court below will be indulged, and in the absence of an affirmative showing to the contrary, a ruling of the court below will be presumed to have been properly made and for sound reasons. 5 Am.Jur.2d, Appeal and Error, §704 (1962). (Emphasis added.)

The burden of proof is upon the Appellants and they have failed to carry that burden.

Finally, the scope of appellate review is also restricted by Appellants' own Brief. Respondents have fully answered the issues presented by the Appellants and are not on notice as to any other issues before the court. In Mead v. Mead, 301 P.2d 691 (Okla 1956), the rule was stated as follows:

It is neither the duty nor the prerogative of the Supreme Court to explore a theory which is not raised in Appellants' Brief, to find a valid ground on which to reverse the trial court's judgment.

Those grounds cited by Appellants' Brief as the basis for their appeal are insufficient to justify a reversal of the lower court's judgment. The presumptions and rules of law controlling the present case are wholly in support of Respondents' position that the judgment of the trial court should be affirmed.

CONCLUSION

The affidavits, pleadings and exhibits on file herein, and the law as cited in Respondents' Brief, in Respondents' Memorandum in Support of Motion for Summary Judgment and in Respondents' Supplemental Memorandum in Support of Motion for Summary Judgment clearly establish that there are no disputed issues of material fact. The uncontroverted facts further establish that Appellants cannot recover a brokerage fee on any

of the alleged transactions. The lower court acted properly and correctly in granting Defendants' motion for summary judgment.

Respectfully submitted,

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I hereby certify that I mailed two copies of the foregoing Brief of Respondent to Robert J. DeBry, Attorney for Plaintiffs-Appellants, 4835 Highland Drive, Suite 295-A, Salt Lake City, Utah 84117, this 22nd day of September, 1975, postage prepaid.

Marlene Peterson