

2008

Lloyd v. Lloyd : Brief of Appellee

Utah Court of Appeals

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UTAH COURT OF APPEALS

Maurine J. Lloyd, :
Plaintiff,

v.

Cynthia M. Lloyd, Dennis S. Lloyd,
and all other persons unknown claiming
other persons unknown claiming any right, :
title, or interest and/or lien upon the real
property described in this pleading adverse
to the plaintiff=s ownership or clouding
title thereto,

Appellate Case No. 20081050

(Trial Court No. 030922233)

Defendants. :

BRIEF OF APPELLEE

APPEAL FROM ORDER ENTERED DECEMBER 4, 2008
BY THE HONORABLE LEON A. DEVER
THIRD DISTRICT COURT, SALT LAKE COUNTY

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Lloyd and for Susan L. and
Richard Martinez

LIST OF ALL PARTIES:

Maureen J. Lloyd
Cynthia M. Lloyd
Dennis S. Lloyd
Susan L. Martinez*
Richard D. Martinez*

*Counsel for the Plaintiff, Billie Crocker, also represents these parties for the purposes of supporting the Appellee's position in this appeal

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JURISDICTION

This Court has jurisdiction over this matter pursuant to Utah Code Annotated §78A-4-103(2)(j).

STATEMENT OF THE CASE

This case involves a Stipulation and Agreement for Court Supervised Sale of Real Property (the “Stipulation”) that provided for the sale of certain real property (the “Subject Property”). Although the Subject Property was listed indefinitely with Ralph Reidel of Coldwell Banker (see Addendum A, Exclusive Listing Agreement) and the Subject Property was under contract for sale (see Addendum B, Real Estate Purchase Contract), the defendants consistently interfered with the marketing and sale of the Subject Property resulting in the cancellation of the REPC and Mr. Reidel’s withdrawal as the listing agent.

Counsel for the defendants was unavailable from October 2007 to April 2008. R. 435-437 and R. 733. As soon as Russell Cline appeared as counsel for the defendants, requests were made for the defendants to cooperate actively with the marketing and sale of the Subject Property in accordance with Paragraph 3 of the Stipulation and Agreement for Court Supervised Sale of Real Property. Information regarding Equity Real Estate and the plaintiff’s proposed listing agent was supplied to the defendants and although the defendant now object to using this real estate company, they never made any attempt to suggest another realtor. The defendants refused to actively market the Subject Property

in violation of the Stipulation. Pursuant to Paragraphs 3, 5 and 7 of said Stipulation, the plaintiff requested that the trial court extend the sale period. On August 26, 2008 this request was granted although no particular real estate company was named in that Order. R. 588-589. The defendants were provided with a listing packet for Equity Real Estate and did not propose another realtor for the listing. Counsel for the defendants consistently led the Equity Real Estate realtor, Dovey Roah, to believe that his clients would be signing a listing agreement with her (See Addendum C, email of 9/23/2008 from Dovey Roah, regarding her impression that Mr. Cline and his clients were agreeable to the listing.

The defendants filed an Objection to the Form of the August 26, 2008 Order on August 28, 2008 which was heard on October 28, 2008. At this time the trial court was again persuaded that the sale period for Subject Property should be extended and specifically ordered that the sale period could not begin until all parties had signed a listing agreement with Equity Real Estate. The minimum sale price agreed to in the Stipulation and Agreement for Court Supervised Sale of Real Property was not altered and the trial court merely reiterated Paragraph 5 of the Stipulation and Agreement for Court Supervised Sale of Real Property by making it clear that if the parties could not agree on offers or if any party continued to act as an impediment to the sale, offers would be presented to the trial court for review.

STATEMENT OF ISSUES

1. Was the trial court authorized under the terms of the Stipulation to order an extension of the sale period when presented with evidence that the Subject Property had previously been under contract, that the defendants had interfered with the initial six month sale period, that another realtor was interested in listing the Subject Property and that the summer would present an optimum opportunity to attract new offers for a sale?
2. Did the trial court have the power to replace the real estate listing agent when the agent hired by the parties withdrew his services and the parties could not agree on a replacement?
3. Did the Stipulation expire by the lapse of time even though a valid Listing Agreement actively marketing the Subject Property was not in place?
4. Is the plaintiff entitled to attorney's fees on this appeal?

ISSUES PRESERVED IN TRIAL COURT

The plaintiff agrees that the foregoing issues were preserved in the trial court at both the May 19, 2008 and October 28, 2008 hearings.

STANDARD OF REVIEW

Under the terms of the Stipulation (Paragraph 5 and 7), the trial court had authority to extend the sales period if it was "persuaded" that such an extension would

likely result in the sale of the Subject Property and to order that offers to purchase be presented to the court for consideration if the parties cannot agree upon acceptance. R. 402. Enforcement of the Stipulation is reviewed for abuse of discretion and the trial court should not be reversed unless its decision exceeds the limits of reasonability Brighton Corp. v. Ward, 31 p.3d 594 (Ut App. 2001).

As to the issue of whether or not the trial court acted properly in appointing a new realtor, it is not clear that this decision should be reviewed under the standard suggested by the defendants. While legal conclusions are reviewed for correctness, findings of fact are given deferential review and appellate review is strictly limited. Grayson v. Finlinson, 782 P.2d 467, 470 (Utah 1989) and Craig v. Weihing, 746 P.2d 279, 282, 283 (Utah 1987). Here the Stipulation is ambiguous with respect to the rights and duties of the parties if the realtor selected by them resigns. Accordingly, the trial court made findings of fact and concluded that the intent of the stipulation could not be completed without the appointment of a new realtor. This decision was consistent with the intent of the Stipulation (to sell the Subject Property) and should not be set aside unless clearly erroneous. The appellate courts do not lightly disturb such findings. Saunders v. Sharp, 806 P.2d 198, 200 (Utah 1991).

Even if the appointment of another realtor is reviewed for abuse of discretion, this Court has held that enforcing a settlement agreement and even setting deadlines for

completion of improvements (where none previously existed in the settlement) was not an abuse of discretion. Mascaro v. Davis, 741 P.2d 938, 945 (Utah 1987).

STATEMENT OF FACTS

1. The Plaintiff, Maureen J. Lloyd, did NOT quit-claim any property to the Defendants on September 30, 1997 – she believes the transfer was fraudulent. Indeed, the purpose of this lawsuit is to invalidate the alleged conveyance and quiet title to the property to the plaintiff.

2. While it is true that the parties’ entered into a Stipulation and Agreement for Court Supervised Sale of Real Property on June 12, 2007, the defendants have misrepresented the provisions of the Stipulation and its practical application to other local laws and regulations, for example, it is a violation of the code of ethics for a realtor to actively market a property without first obtaining a Listing Agreement signed by all parties. Therefore, the Subject Property could not be listed or marketed for sale until all parties executed a Listing Agreement with a licensed real estate agent.

3. Counsel for the defendants was unavailable from October 2007 to April 2008. R. 435-437 and R. 733. The defendants have consistently refused to sign any such Agreement thus sabotaging the Stipulation and any potential marketing or sale of the Property in direct violation of Paragraph 3 of said Stipulation which requires all parties to “actively market in good faith the Subject Property”. R. 401.

4. On May 19, 2008 the plaintiff made a motion pursuant to Paragraph 7 of the Stipulation to extend the sale period for the Subject Property. Susan L. Martinez and Richard Martinez, parties to the Stipulation, were aware of this hearing date and agreed with the plaintiff's motion to extend. The defendants fail to include in their statement of facts the plaintiff's motion to extend the sale period included a proffer that the original listing agent, Ralph Reidel, had withdrawn as the listing agent due to the defendants' failure to cooperate with the first listing and Real Estate Purchase Contract. The defendants have never disputed the allegation that they have failed to cooperate with the marketing of the Subject Property. The plaintiff also proffered that the marketing and sale period should be extended as the property had previously been under contract and that with summer approaching this would be the best time of year to list the Subject Property for sale and get it back under contract. R 726-727. Pursuant to Paragraphs 5 and 7 of the Stipulation, Judge Dever was persuaded by these facts that an additional six month sale period would likely result in the sale of the Subject Property and on August 5, 2008 he ordered an extension of the sale period. This Order was signed on August 26, 2008 and did not alter the listing price or the ultimate sale price.

5. Although not made part of the record, the defendants were given a listing packet prepared by Dovey Roah, Equity Real Estate and dated April 23, 2008. Until now, the defendants have never objected to hiring Dovey Roah, Equity Real Estate, as the listing agent. In fact, conversations with the defendants' counsel on or about September

23, 2008 led Ms. Roah to believe that the Petitioners were in agreement to list the property with her firm. See Addendum C email dated September 23, 2008.

6. The defendants filed a Motion to Dismiss on August 18, 2008 (in violation of Paragraph 2 of the Stipulation) and an Objection to the Proposed Order on August 28, 2008. The Objection was heard on October 28, 2008. At that hearing, the defendants' failure to cooperate and the requirement that the parties sign a listing agreement was discussed. R. 726-729, 736, 738 The defendants were specifically ordered to execute the listing agreement as a prerequisite to beginning the additional sale period. The defendants did not obey this order and have still not signed a listing agreement nor have they made any attempts to cooperate with the marketing or sale of the Subject Property.

7. The defendants' Statement of Facts would lead this Court to believe that the contemplated sale MUST be for no less than \$9.50 per square foot. This is not true as Paragraph 5 of the Agreement clearly states that the parties will "list and market" the Subject Property for sale for no less than \$9.50 per square foot. This Paragraph 5 also gives the trial court discretion to entertain all offers and to order the sale of the Property if the parties cannot agree or if either party fails to cooperate in the sale. R. 401. The listing agreement proposed by Equity Real Estate was that the Subject Property be marketed for \$10.00 per square foot. (Addendum D, page 2) This is in compliance with the terms of the Stipulation.

8. The defendants have inaccurately quoted the Stipulation and have inserted the requirement that the Property sell for “not less than \$9.50 per square/foot [sic]” when Paragraph 7 of the Stipulation authorizing the District Court to extend the sales period contains no such restriction. Furthermore, although the minutes of the hearing on October 28, 2008 state that “the price of the home may change”, the lower court did not order a reduction in the list price. See Minute Entry of 10/28/08 and the December 4, 2008 Order. R. 645 and R. 649-651. No reduction in the asking price has ever been ordered by the trial court.

9. Despite the trial court’s explicit Orders (in August 2008 and again in December 2008) to immediately list the property, the defendants have delayed signing the listing agreement and have brought motions and petitions designed to avoid marketing the Subject Property. The realtor has attempted to obtain signatures for the Listing Agreement by contacting the defendants’ attorney and by trying to contact the defendants directly. The defendants have impeded the marketing of the Subject Property for the last ten months in violation of Paragraph 3 of the Stipulation (to actively market in good faith) and Paragraph 8 of the Agreement to Sell Real Property dated 6-12-2007 (to cooperate fully and promptly with each other and the Listing Agent). R. 395-434.

SUMMARY OF ARGUMENT

The trial court was persuaded that an extension of the sale period would likely result in a sale of the Subject Property and correctly granted the requested extension as

authorized by the Stipulation (Paragraph 7). Likewise, the trial court did not abuse its discretion by reminding the parties in its order of December 4, 2008 that the court was authorized by Paragraph 5 of the Stipulation to review offers to purchase if the parties could not agree upon acceptance. The trial court's decision to enforce the terms of the Stipulation should not be reversed unless it was an abuse of discretion. Mascaro v. Davis, 741 P.2d 938, 942 (Utah 1987).

The defendants have inaccurately marshaled the evidence and claim that there are no facts supporting the trial court's decision. The trial court considered the following: 1) that the Subject Property had previously been under contract 2) that the contract for purchase had failed and that the listing agent had withdrawn his services, 3) that the defendants were not cooperating with the listing or sale of the Subject Property, 4) that opportunities for a sale of the Subject Property still existed and 5) that the summer market was approaching and would be a good time to get the Subject Property back on the market. In light of these facts, the trial court did not abuse its discretion when it reasonably concluded that an additional six month sale period would likely result in the sale of the Subject Property.

The court did not err in appointing a listing agent since the realtor chosen by the parties had withdrawn, the parties could not agree on a replacement, and the appointment was required in order to accomplish the stated goals of the Stipulation. Courts possess

inherent powers to make decisions that ensure the pursuit of a just process and result. Burke v. Lewis, 122 P.3d 533, 538 (Utah 2005).

The Stipulation has not expired because the Subject Property could not be “actively marketed” as required by the Stipulation unless a Listing Agreement was signed by all parties and in full force and effect. The defendants admit that the realtor resigned, that counsel was unavailable and that they would not sign a new Listing Agreement. Therefore, the extended sale period has never started.

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ENFORCING THE TERMS OF THE STIPULATION AND EXTENDING THE SALE PERIOD

The law favors settlement of disputes and enforcement of settlements between the parties litigant should be encouraged. Mascaro v. Davis, 741 P.2d 938, 942, 946-947 (Utah 1987). In this matter, the Stipulation clearly provides that “the sale period may be extended for an additional six (6) months, by Court order, provided that the Court is persuaded that an additional six (6) month sale period will likely result in the sale of the Subject Property”. R. 403. This provision says nothing about list price or sale price although the defendants have consistently inserted an additional requirement in Paragraph 7 that the extension would likely result in the sale of the Subject Property “for not less than \$9.50 per square foot”. See Appellant’s Brief at pages 4 and 6, 10, 14. If the defendants wanted Paragraph 7 to read exactly this way, then they should have written

the document as they now read it as they were the drafters. The clear language of the Stipulation, however, only requires that the Court be persuaded that that an extension would likely result in a sale.

In extending the sale period, the trial court considered the following: 1) that the Subject Property had previously been under contract 2) that the contract for purchase had failed and that the listing agent had withdrawn his services, 3) that the defendants were not cooperating with the listing or sale of the Subject Property, 4) that the defendants were not represented by counsel for an extended period of time, 5) that opportunities for a sale of the Subject Property still existed and 6) that the summer market was approaching and would be a good time to get the Subject Property back on the market. Factual findings serving as a predicate for the trial court's actions will be disturbed only if they are clearly erroneous. Grayson v. Finlinson, 782 P.2d 467, 470 (Utah 1989) In light of these facts, the trial court did not abuse its discretion when it reasonably concluded that an additional six month sale period would likely result in the sale of the Subject Property.

In addition to the facts noted above, the trial court was also presented with information that a new realtor was willing to list the property. The defendants claim that the Listing Packet prepared by Equity Real Estate is a fact that should not be considered as the Packet is not reflected in the record. The Packet clearly exists and was presented to the defendants. See Addendum D. This Court in Mascaro v. Davis, 741 P.2d 938, 943 (Utah 1987). held that when crucial matters are not in the record, the missing

portions are presumed to support the trial judge. Therefore, the existence and information contained in the Listing Packet is presumed to be additional evidence available to the trial judge in support of his decision.

Courts have the power to summarily enforce settlement agreements and it would have been an abuse of discretion for the trial court not to have extended the sale period as there appears to be no reason for the defendants' noncompliance. See In Re Adoption of E.H., 103 P.3d 177, 185 (Utah App. 2004). The defendants interfered with the first sale, were uncooperative with the listing agent, their counsel was unavailable for months and they failed to execute a second listing agreement.

Considering all evidence presented by the plaintiff and the non-existence of any evidence that the Subject Property would not sell, the trial court's decision to extend the sale period was predicated on an overwhelming amount of facts any of which could have persuaded the court that an extension was reasonable and likely to result in a sale. The extension was authorized by the Stipulation (Paragraph 7) and should not be overturned.

II. THE TRIAL COURT IS AUTHORIZED BY THE STIPULATION TO REVIEW OFFERS TO PURCHASE IF THE PARTIES CANNOT AGREE AGREE UPON ACCEPTANCE

The defendants claim that the trial court abused its discretion by ordering that "Offers to purchase shall be presented to the court for consideration if the parties cannot agree upon acceptance". This Order is authorized by Paragraph 5 of the Stipulation which provides for judicial review of proffered offers if any party "fails, refuses to

cooperate, fails to perform in accordance with the terms of the Agreement to Sell Real Property or otherwise acts as an impediment to the sale of the Subject Property”. In light of the defendants’ failures to cooperate and obvious avoidance of the new realtor, Judge Dever was merely anticipating resolution of future disagreements between the parties by reminding the parties that the court had the power to review and order a sale if the parties did not cooperate when offers were received.

The defendants also claim that the Order eliminated the requirement that the property be marketed for no less than \$9.50 per square foot. This is not true. The Order made no decision to summarily accept any offer presented regardless of price and the Listing Agreement proposed suggests that the property be marketed for \$10.00 per square foot, an amount exceeding the minimum required by the Stipulation. The defendants’ argument that the Order somehow affected the list price or the ultimate selling price has no merit.

III. THE TRIAL COURT HAS INHERENT AUTHORITY TO APPOINT A NEW REALTOR WERE THE STIPULATION IS AMBIGUOUS AND THE APPOINTMENT IS NEEDED TO ENSURE THE PURSUIT OF A JUST PROCESS AND RESULT

Courts of general jurisdiction have the inherent power to make and enforce all necessary rules and orders calculated to enforce the orderly conduct of their business and secure justices between parties litigant. Peterson v. Evans, 55 Utah 505, 188 P. 152, 153 (Utah 1920). Courts possess inherent powers to ensure the pursuit of a just process and result. Burke Lewis, 122 P.3d 533, 538 (Utah 2005).

In this case, the Stipulation is ambiguous with respect to the rights and duties of the parties if the realtor selected by them withdraws. In such an instance it is proper for the trial court to take evidence necessary to establish the terms of the agreement and appellate review is “strictly limited”. Craig v. Weihing, 746 P.2d 279, 282, 283 (Utah 1987). The appellate courts do not lightly disturb such findings. Saunders v. Sharp, 806 P.2d 198, 200 (Utah 1991). The trial court considered the facts (R. 725, 726, 737-739) and appointed a new realtor in order to accomplish the goals of the Stipulation. A “just process and result” could not be ensured and the intent of the stipulation could not be completed without appointment of a new realtor. This is consistent with the intent of the parties and local industry standards and state regulations that require a property marketed for sale to be formally listed for sale with a licensed realtor.

IV. THE STIPULATION HAS NOT EXPIRED AS THE SECOND SALE PERIOD HAS YET TO BEGIN

The trial court rejected the defendants argument that the mere passage of time exceeding two consecutive six month periods was enough to satisfy the marketing periods contemplated by the Stipulation. The trial court specifically noted that it made no sense to count this time against the plaintiff when the defendants were actively filing motions and refusing to list the property. R. 734-735.

At the time that the listing agent, Ralph Reidel, withdrew his representation, the defendants’ counsel had filed a Notice of Unavailability and their current counsel admits that he did not appear until April 2008. R. 435-437 and R. 733. The motion to extend

the sale was made in May 2008. The plaintiffs were certainly not responsible for any delay in marketing and should not lose the opportunity to extend the sale period as clearly authorized by Paragraph 7 of their Stipulation.

The trial court considered these facts and reasonably concluded that the goals of the Stipulation to “actively market” the Subject Property (See Paragraph 3 of the Stipulation, R. 401) could not be accomplished unless the property was properly listed and marketed for sale by a licensed realtor. The trial court did not abuse its discretion by ruling that the extended sale period could not begin until a valid Listing Agreement is signed.

V. THE PLAINTIFF IS ENTITLED TO AN AWARD OF HER ATTORNEYS
FEES INCURRED IN THIS APPEAL

Paragraph 11, Section E of the Stipulation (R. 404) provides that the prevailing party is entitled to recover attorneys’ fees, court costs and other expenses on appeal in the event of any controversy relating to or arising from the Stipulation. In the event that the appellee is the prevailing party on appeal, this Court should award appellees her attorneys’ fees incurred on appeal.

CONCLUSION

The trial court did not abuse its discretion in extending the sale period as it was presented with sufficient information to persuade the court that an extension would likely result in the sale of the Property. Judge Dever’s Order of December 4, 2008 did not alter the terms of the Stipulation, affect the rights of the parties or materially affect the final

decision of the case as the Order merely served to implement the terms of the parties' Stipulation and made no other decisions regarding sale of the Property. The Order does not alter the listing price but merely restates Paragraph 5 of the Stipulation which provides for judicial review of proffered offers if an offer is presented and the parties cannot agree upon its acceptance. Nowhere in the Order is the sale price or listing price reduced. In light of the Petitioners failure to cooperate, Judge Dever was merely anticipating resolution of future disagreements between the parties by clarifying the Stipulation and the need to execute a listing agreement in order to begin the extended sale period. There has been no abuse of discretion and the trial court's enforcement of the Stipulation and extension of the sale period should be upheld.

The Order of December 4, 2008 simply clarifies the Stipulation and makes it clear to the parties that the Property cannot be considered to have been actively marketed until all parties sign a listing agreement. It makes no sense to argue that the sale period has already elapsed simply because time has passed because the Property cannot be actively marketed for sale without a valid Listing Agreement executed by all parties and property owners. In the first sale period, the Petitioners selected the listing agent and all parties signed the listing agreement clearly starting a sale period. The listing ended when the realtor withdrew his continued representation because he found the Petitioners to be uncooperative and not truly interested in selling the Property. The parties failed to agree

upon a new listing agent or upon an extension of the sale period thereby prompting the plaintiff's motions.

The court did not err in appointing a listing agent as it had inherent powers to make rulings needed to ensure a just process and result. The Stipulation is ambiguous with respect to the rights and duties of the parties if the realtor selected by them withdraws. Accordingly the trial court was justified in taking evidence to establish the terms of the agreement and to appoint a new realtor in order to accomplish the goals of the Stipulation.

The interests of justice will be better served if the Stipulation is enforced and the Property actively marketed in an attempt to avoid the expense of additional litigation. The trial court's Order should be upheld.

DATED THIS _____ DAY of April, 2009.

BY: _____
Billie Crocker, Attorney for Plaintiff, Maureen
J. Lloyd, Susan L. Martinez and Richard
Martinez

MAILING CERTIFICATE

A copy of the foregoing Appellee's Brief was mailed on the ____th day of April, 2009, postage prepaid to the following:

Russell A. Cline
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