

1979

Allphin Realty, Inc. v. Wesley F. Sine : Petition for Rehearing

Utah Supreme Court

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Recommended Citation

Petition for Rehearing, *Allphin Realty, Inc. v. Sine*, No. 16036 (Utah Supreme Court, 1979).

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

ALLPHIN REALTY, INC.)	
)	
Plaintiff and)	
Appellant,)	
)	
vs.)	Case No. 16036
)	
WESLEY F. SINE,)	
)	
Defendant and)	
Respondent.)	

PETITION FOR REHEARING

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IN THE
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Plaintiff and)
Appellant,)

vs.)

Case No. 16036

WESLEY F. SINE,)

Defendant and)
Respondent.)

PETITION FOR REHEARING

Comes now Appellant in the above-entitled matter, with all due respect to this Honorable Court and the individual justices thereof, respectfully petitions this Court for rehearing in this cause for the following reasons and upon the following grounds:

POINT I.

THIS COURT ERRED IN RENDERING ITS OPINION IN THIS CAUSE IN HOLDING THAT THE PURPORTED PURCHASER WAS NOT ONE OF THOSE SET FORTH IN THE AGREEMENT BETWEEN THE PARTIES.

POINT II.

THE COURT ERRED IN ITS OPINION IN HOLDING THAT THE "USUAL FORM OF REAL ESTATE LISTING" WOULD HAVE TO BE USED IN ORDER TO MERIT A CLAIM FOR A COMMISSION TO A BROKER WHERE A SELLER REFUSED TO COOPERATE IN CONSUMMATING A SALE.

WHEREFORE, Petitioner prays for rehearing in this cause, and that the matter be set for further argument, and that upon such rehearing this Court vacate its decision on file herein and reverse the trial court's order granting Respondent's Motion for Summary Judgment.

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BRIEF IN SUPPORT OF PETITION FOR REHEARING

POINT I.

THIS COURT ERRED IN RENDERING ITS OPINION IN THIS CAUSE IN HOLDING THAT THE PURPORTED PURCHASER WAS NOT ONE OF THOSE SET FORTH IN THE AGREEMENT BETWEEN THE PARTIES.

This Court stated that the Appellant's Complaint failed to state a cause of action by reason of the fact that the purported purchaser was not one of those set forth in the document. This issue has never been before the trial court, was not argued before this Court, and to hold that the purported purchaser was not one of those listed on the agreement and was not an associate of one of those set forth in the agreement between Appellant and Respondent is denying Appellant his right to a jury trial on an issue of fact.

POINT II.

THE COURT ERRED IN ITS OPINION IN HOLDING THAT THE "USUAL FORM OF REAL ESTATE LISTING" WOULD HAVE TO BE USED IN ORDER TO MERIT A CLAIM FOR A COMMISSION TO A BROKER WHERE A SELLER REFUSED TO COOPERATE IN CONSUMMATING A SALE.

This Court in Hoyt v. Wasatch Homes, 261 P.2d 927, held that in a counterclaim by a broker-defendant for a commission in an agreement that a commission would be paid only if a sale were consummated, held that the plaintiff-owner would not be permitted to prevent the accomplishment of what he requested and authorized the broker to do by arbitrarily refusing to perform his part of the transaction. This Court in the Hoyt v. Wasatch Homes case said:

"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."

This Court's ruling in the instant case that the usual listing contract would be required to permit a broker to sue for commission against a non-cooperating seller is contrary to the ruling in the above case.

In Cummings v. Nielson, 29 P. 619, this Court indicated that a petition for rehearing might be granted where this Court had overlooked a decision which may affect the result.

Further, this Court in Brown v. Pickard, 11 P. 512, indicated that a rehearing would be justified where this Court had erred in its conclusion.

CONCLUSION

The Court's ruling in the instant case is contrary to a prior decision. The trend of the law towards justice and fair play would not only sustain the prior ruling of this Court but would extend it to protect not only owners-sellers, but also agent-brokers in their dealings one with another. To deny or not require fair dealings because of the arrangement of words in a memorandum of agreement is contrary to reason, justice and the trend of the law.

Plaintiff-Appellant is entitled to a jury trial to determine whether Defendant-Respondent failed to cooperate and whether such failure prevented a sale, and if so, Plaintiff-Appellant should be entitled to a commission.

Respectfully submitted,

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