1979

Allphin Realty, Inc. v. Wesley F. Sine : Respondent's Reply Brief on Petition for Rehearing

Utah Supreme Court

Robert E. Froerer; Attorney for Plaintiff-Appellant;
Ronald C. Barker; Attorney for Defendant-Respondent;

SUPREME COURT OF THE STATE OF UTAH

Case No. 16036

ALLPHIN REALTY, INC.,

Plaintiff-Appellant,

vs.

WESLEY F. SINE,

Defendant-Respondent.

RESPONDENT'S REPLY BRIEF ON PETITION FOR REHEARING

Appeal from the Judgment of the Third Judicial District Court of Salt Lake County, Utah, the Honorable David K. Winder, District Judge

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NATURE OF THE CASE

Suit by real estate broker for commission on sale which was never consumated.

DISPOSITION IN LOWER COURT

Summary judgment dismissing claim because conditions precedent to earning a commission had not occurred and listing contract did not meet minimum requirements of the Utah Statute of Frauds, 25-5-4(5), UCA, 1953.

STATEMENT OF FACTS

Defendant incorporates by reference the statement of facts contained in his original brief herein.

DISPOSITION ON APPEAL

This Court affirmed the summary judgment of dismissal.

RELIEF SOUGHT

Denial of petition for rehearing

ARGUMENT

The points raised by appellants in their brief in support of their petition for rehearing will be considered in the same order as they appear in that brief.

POINT I

THE DECISION IN THIS MATTER DOES NOT DECIDE THAT THE BROTHER WHO WAS THE PROPOSED PURCHASER WAS NOT AN "ASSOCIATE" WITHIN THE MEANING OF THE LISTING CONTRACT.

In Point I of appellant's brief it is argued that this Court erred in allegedly "holding that the purported purchaser was not one of those set forth in the agreement between the parties, " (P.2). The obvious answer to this assertion is the language of this Court's decision which reads in part as follows (last paragraph):

> "The plaintiff further contends that the purported purchaser was an"associate" of one of the purchasers named in the document, to wit: a brother. We need not decide whether the brother was an "associate" within the meaning of the document because the fact that no sale was made is controlling here." (Emphasis added)

Sincer the dicisionof this Court expressly excludes a determination of that issue and holds that the fact that no sale was made is controlling no basis in fact or in law exists for granting of appellant's petition for rehearing based upon the argument asserted under Point I.

POINT II

THE DECISION IN THIS MATTER DOES NOT HOLD THAT THE "USUAL FORM OF REAL ESTATE LISTING" MUST BE USED TO MERIT A CLAIM FOR A COMMISSION AGAINST A NON-COOPERATING SELLER.

Counsel for appellant has selected certain words of the decision of this Court and argues that the decision in this case is, in effect, a holding that the "Usual listing contract would be required to permit a broker to sue for a commission against a non-cooperating seller." Counsel mis-construes the holding of the Court in this matter.

The Court did make reference in footnote #3 to the usual form of real estate contract and to the usual provision therein to the effect that a commission is promised if a ready, able and willing purchaser is produced who agrees to the price demanded by the seller. However, the Court's decision is not a holding that the only circumstances under which a commission could be collected from a non-cooperating seller would be where that specific wording was used, as argued by appellant.

The Court pointed out that (1) appellant drafted the contract, (2) that it was "incumbent upon it to comply therewith if it was to earn the stated commission," and (3) that "there was no agreement on the part of the defendant to accept the offer made," and (4) that "since no sale was consummated, no commission was earned." Under the undisputed facts appellant was not entitled to a commission and the summary judgment was properly granted by the trial court.

The language quoted by appellant from Hoyt v. Wasatch Homes, 261 P.2d 927, 1 U (2d) 9, supports the summary judgment and precludes rehearing, (P. 3 of brief). That wording reads in part as follows:

> "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. . . ." (Emphasis added)

Since there was no sales price mentioned in the contract (P. 2 of Sine's original brief herein) it is difficult to understand how appellant can now argue that they presented an offer on "terms accepted" since no offer was accepted by Sine. As observed by the Court (second paragraph) the offer that was presented was subject to conditions and was rejected. No unconditional offer of purchase was ever presented, and the conditions stated in that offer never occurred. Sine was not "arbitrary" in refusing to accept that offer since he had an absolute right to do so under the terms of the contract between the parties.

Appellant's final argument (stated in the conclusion, page 4 of brief) to the effect that the commission should not be denied "because of the arrangement of words in the memorandum of agreement" appears to be a request to the Court to disregard the contract between the parties and for the Court to make a new agreement to assist appellants with their claim on some vague notion of "justice." Such a rule would destroy the value of a contract and would throw the commercial world into chaos. In the recent case of Russell v. Park City Utah Corp., 548 P.2d 899, cert den. 97 S.Ct, 162, (Utah Supreme Court 1976) the rule was stated:

"parties are free to contract according

> ing to their desires in whatever terms they can agree upon; and further, that the contract should be enforced according to its terms, unless that result is so unconscionable that a court of equity will refuse to enforce it."

Both parties are bound by their contract. The district court properly enforced the terms of the contract according to its terms, which terms are construed against appellant who drafted that contract (see discussion on pages 7 & 8 of Sine's original brief herein).

CONCLUSION

No adequate basis has been shown within the meaning of Rule 76(e), URCP, for the granting of the petition for rehearing. Accordingly, that peition should be denied and the case remanded to the District Court.

Dated the 6th day of June, 1979.

Ronald C. Barker

Ronald C. Barker, attorney for defendant-respondent, Wesley F. Sine, 2870 South State Street, Salt Lake City, Utah 84115, telephone 486-9636

I hereby certify that I caused a copy of the foregoing to be mailed, postage prepaid, the 6th day of June, 1979, to Robert E. Froerer, attorney for Plaintiff, P. O. Box 107, Ogden, Utah 84402.

Ronald C. Barker

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