

1986

Gump and Ayers Real Estate, Inc., a Utah corporation, and Victor R. Ayers, it designated real estate broker v. Domcoy Investors V, a California partnership, and Domcoy enterpriser, Inc., a utah corporation and a general partner of Domcoy Investor V : Brief of Respondent

Utah Supreme Court

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Recommended Citation

Brief of Respondent, *Gump & Ayers Real Estate, Inc. v. Domcoy Investors V*, No. 198621008.00 (Utah Supreme Court, 1986).
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IN THE SUPREME COURT
OF THE STATE OF UTAH

GUMP & AYERS REAL ESTATE, INC.,
a Utah corporation, and VICTOR R.
AYERS, its designated real
estate broker,

Plaintiffs and
Respondents,

-vs-

DOMCOY INVESTORS V, a
California partnership, and
DOMCOY ENTERPRISES, INC., a
Utah corporation and a general
partner of DOMCOY INVESTORS V,

Defendants and
Appellants.

Case No. 21008

BRIEF OF RESPONDENTS

APPEAL FROM JUDGMENT AND ORDER OF THE
THIRD JUDICIAL DISTRICT COURT, HONORABLE DAVID B. DEE

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STATEMENT OF ISSUE

Did the District Court err in granting Summary Judgment awarding plaintiffs a real estate commission on the sale of a commercial property which was the subject of a written exclusive listing agreement.

DETERMINATIVE STATUTES

Rule 56, Utah Rules of Civil Procedure

STATEMENT OF THE CASE

A. Nature of the Case

In this action, plaintiffs seek an award of a real estate sales commission pursuant to a written exclusive listing agreement for the sale of a commercial building owned by the defendants.

B. Course of Proceedings

On August 30, 1985, cross-motions for summary judgment were argued before the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable David B. Dee, presiding.

C. Disposition in the Court Below

On October 8, 1985, the District Court granted summary judgment in favor of the plaintiffs and against the defendants entitling plaintiffs to a real estate commission pursuant to the exclusive listing agreement.

STATEMENT OF FACTS

1. Gump & Ayers Real Estate, Inc. is a Utah corporation and Victor R. Ayers, a licensed real estate broker, is the designated broker for Gump & Ayers (collectively "Gump & Ayers"). R. 3 para. 1-2.

2. Defendant Domcoy Investors V is a California limited partnership ("Domcoy"). R. 153, p. 25.

3. Defendant Domcoy Enterprises, Inc., a Utah corporation (the "Domcoy Corporation") is the sole general partner of Domcoy. R. 153, p. 12.

4. The Domcoy Corporation is owned by the following individuals in the following percentages: Mr. and Mrs. Eugene E. Doms (50%) and Mr. and Mrs. Michael R. McCoy (50%). Mr. McCoy ("McCoy") and Mr. Doms ("Doms") are officers and directors of Domcoy Corporation with McCoy serving as President. McCoy is a practicing attorney, and was admitted to the California Bar in 1975. R. 153, p. 12.

5. Domcoy was formed in late 1982 for the purpose of acquiring real property in Salt Lake City, Utah, specifically the Sterling-Greenwald Building, located at 35 West Broadway ("Property"). The Property is classified as a historic structure. Such a classification bestows unique tax advantages to investors/owners. R. 153, p. 25.

6. Domcoy purchased the Property in December, 1982.
R. 153, p. 29.

7. Doms, representing Domcoy, interviewed numerous brokers in an attempt to list the Property. In the spring of 1984, at Gump & Ayers main office in Salt Lake City, Doms interviewed Ronald W. Christensen ("Christensen"), the manager of the Commercial Division of Gump & Ayers. R. 152, p. 11.

8. During the initial meeting between Christensen and Doms, Doms requested, and later received, from Gump & Ayers a marketing proposal for the Property. R. 152, p. 15.

9. Copies of the marketing proposal were sent to Doms and McCoy, after which Doms told Christensen that McCoy would contact Gump & Ayers concerning the marketing of the Property.
R. 152, p. 15.

10. In July of 1984, Christensen and McCoy met. McCoy told Christensen that Domcoy's plans for marketing the Property, that is, whether to lease or sell office condominiums, and the price for such, were yet to be determined. McCoy also told Christensen that Domcoy's plans were still in flux because it was studying the procedure for historic rehabilitation certification and the tax credits available. This was information that potential tenants would find material.

11. During a subsequent meeting between McCoy and Christensen, a discussion was had concerning the general marketing of the Property, the present inability to establish an exact price for sale or lease of the Property and the fact that McCoy would personally handle the marketing of the Property while Doms would be responsible for the construction/rehabilitation of the Property. R. 152, p. 32.

12. During the aforementioned meeting, or at a subsequent meeting, between Christensen and McCoy, a Sales Agency Contract between Gump & Ayers and Domcoy was discussed ("Listing Agreement"). Appendix I. In discussing the Listing Agreement, Christensen told McCoy that the document was broad enough to entitle Gump & Ayers to a commission whether the Property was leased, sold or exchanged and, in addition, that once the Listing Agreement was signed, Gump & Ayers could market and put a sign on the Property. Christensen also told McCoy that Domcoy would have the ultimate decision on whether the Property was sold or leased as well as the ultimate purchase price for the Property. Christensen would not have marketed or placed a sign on the property without such a signed Listing Agreement. R. 152, pp. 32-35.

13. After Christensen explained the Listing Agreement to McCoy, McCoy read it and signed it. R. 153, p. 33, 44; P. 152, p. 36.

14. McCoy signed the Listing Agreement in his capacity as President of the Domcoy Corporation and as General Partner of Domcoy. R. 153, p. 33.

15. In addition to being a lawyer, McCoy had substantial experience in the real estate development having bought and sold approximately 17 properties over the 5 year period preceding the Listing Agreement. R. 153, pp. 6-24.

16. Prior to the execution of the exclusive listing agreement with Gump & Ayers, Domcoy had signed several single party or non-exclusive listing agreements with other brokers. These non-exclusive agreements had not resulted in a sale or lease of the building.

17. During the meeting at which McCoy signed the Listing Agreement, Christensen explained to him that an "Available" sign posted on the Property would denote that the Property was available for sale, lease or exchange. McCoy had no objection to having this particular type of sign placed on the Property. R. 152, p. 40.

18. On August 29, 1984, after the Listing Agreement was signed by McCoy, Gump & Ayers put an "Available" sign on the Property and actively began its efforts to market the Property. R. 152, p. 24.

19. After the Listing Agreement was signed by McCoy and Gump & Ayers's sign was placed on the Property, McCoy and

Christensen spoke often by telephone concerning the progress of the construction on the property and any inquiries received by Gump & Ayers from potential buyers or tenants. McCoy was responsive to the marketing needs of Gump & Ayers and the information needs of prospective tenants. R. 152, p. 48.

20. During the month of December 1984, the communication channels between Christensen and McCoy broke down. Christensen had arranged two meetings with McCoy at Gump & Ayers main Salt Lake City Office. These meetings were intended to show the Property to prospective purchasers and/or tenants. McCoy agreed to such meetings on two separate occasions but failed to attend the meetings without any advance notice to Christensen. R. 152, pp. 49-52.

21. After McCoy failed to meet with Christensen, Christensen called Domcoy's counsel to find out why the appointments were missed. Christensen was informed by Domcoy's counsel that he did not know. In addition, after McCoy missed the appointments he also failed to return any of Christensen's telephone calls. Approximately two weeks after the appointments were missed, Domcoy's counsel told Christensen that the Property had been sold and, in addition, he apologized for the "break-down in communication". R. 152, p. 53.

22. The Property was sold by Domcoy to an entity known as Garfield Residential Ltd. Partnership #611, a Connecticut

limited partnership ("Garfield") on December 31, 1984. R. 153
p. 34

23. At no time, either before or after the Property's sale to Garfield, did a representative of Domcoy inform Gump & Ayers that the Listing Agreement had been terminated. R. 153 pp. 56, 57.

24. The Property was initially sold for \$5,857,000.00. R. 153. p. 36. However, the Sales Agreement was later amended and the sales price was reduced to \$4,900,000.00. R 130, Para. 1.

25. According to the express terms of the Listing Agreement, a six-percent (6%) commission was payable to Gump & Ayers if, during the term of the Listing Agreement, the Property was sold, leased or exchanged by the owner, or any other party. R. 48, Para. 2.

26. The Listing Agreement also provided that such a commission would be due and payable upon the closing of the sale or exchange, unless otherwise agreed in writing. The parties did not agree in writing to have the commission paid at any other time. R. 48 Para. 2.

27. Gump & Ayers made repeated demands upon Domcoy for a commission of 6-percent (6%) of the price paid by Garfield for the Property; however, Domcoy refused to pay the commission. R. 39 Para. 30.

28. On or about February 8, 1985, this action was filed by Gump & Ayers seeking its commission from Domcoy. R. 2

29. After discovery, cross-motions for Summary Judgment were filed by Gump & Ayers and Domcoy. These motions were argued on August 30, 1985, before the Third Judicial District Court, the Honorable David B. Dee, presiding. R. 101.

30. On October 8, 1985, the Trial Court granted Summary Judgment in favor of Gump & Ayers. R. 108.

31. This appeal followed. R. 123.

SUMMARY OF ARGUMENTS

Gump & Ayers and Domcoy voluntarily and at arm's length entered into an exclusive listing agreement for the sale of the historic Sterling-Greenwald Building. In reliance on the Listing Agreement, Gump & Ayers spent time and money in its efforts to market the Property. After the Property was sold, Domcoy sought to avoid payment of the commission. It did not seek to cancel or reform the agreement based upon fraud, misrepresentation or mutual mistake of fact--for these claims were not and in good faith could not be raised. Rather, it sought to avoid its contractual obligations because the Listing Agreement was not "sufficiently definite" to be enforced. Despite the fact that cross-motions for summary judgment were filed, Domcoy now argues that extrinsic facts are necessary to interpret the Listing Agreement.

ARGUMENT

THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF THE GUMP & AYERS ON THE LISTING AGREEMENT.

A. Introduction

In essence, Domcoy argues that the District Court erred in granting Summary Judgment in favor of Gump & Ayers on the Listing Agreement because there are disputed issues of material fact concerning the intent of the parties to the Listing Agreement. Specifically, the Domcoy contends:

(1) That its intent in signing the Listing Agreement was merely as an "accommodation" to allow Gump & Ayers to place an "Available" sign on the Property;

(2) That there was no meeting of the minds concerning a commission; and

(3) That the Listing Agreement is too vague to be enforceable since no listed price or term was included.

Based upon these alleged infirmities, Domcoy contends that the intent of the parties to the Listing Agreement could not be ascertained from the Listing Agreement standing alone and, therefore, extrinsic evidence should have been received by the District Court to arrive at the parties' intent. As will be shown below, this contention is erroneous.

The Listing Agreement is exclusive. It is well-established that a broker earns a real estate commission pursuant to an exclusive listing agreement when the subject property is sold during the term of such agreement. This Court has enforced exclusive listing agreements because of their necessity in the real estate industry. Chumney v. Stott, 14 Utah 2d 202, 381 P.2d 84 (1963). In the Chumney decision, it was stated:

Moreover, the type of "exclusive right to sell" real estate listings involved in this action has been universally upheld. The nature of the real estate business, wherein the broker is paid only if a sale is made, would seem to make the contract provision here in question a reasonable one.

14 Utah 2d 205, 381 P.2d 86. The property in Chumney was sold to a buyer who had not dealt in any way with the broker; rather, the sale was made by the owner without the broker's knowledge. Yet, it was held that the broker was entitled to a commission.

The reasoning of Chumney is applicable to the facts of this case. The parties entered into an exclusive Listing Agreement. Based upon the Agreement, Gump & Ayers invested its time and money in the marketing of the Property. It would not have marketed the Property without knowing it would be compensated for its efforts when the property was sold. Domcoy accepted the full benefit of Gump & Ayers's services and encouraged Gump & Ayers in its marketing efforts. The Property was sold before

the Listing Agreement was terminated; therefore, a commission was earned by Gump & Ayers.

B. The Listing Agreement is not Ambiguous

As this Court stated in its decision in the case of Oberhansly v. Earle,

It is a basic principle of contract law that there can be no contract without a meeting of the minds of the parties which must be spelled out either expressly or impliedly with sufficient definiteness to allow enforcement . . . Of course the intentions of the parties are controlling and normally those intentions can be found from the instrument itself. If a writing is not sufficient to establish meaning, however, resort may be had to extraneous evidence manifesting the intentions of the parties.

572 P.2d 1384 at 1386 (Utah 1975). See also Bennett v. Robinson's Medical Mart, Inc., 18 Utah 2d, 186, 417 P.2d 761 (1966).

As discussed in the Oberhansly decision, a court's first and foremost task in determining the intent of the parties to a written agreement is to determine whether the agreement is ambiguous. This determination is a question of law to be decided by the court, Morris v. Mountain States Telephone and Telegraph Company, 658 P.2d 1199 (Utah 1983); Hippon v. Truck Insurance Exchange, 657 P.2d 1358 (Utah 1983); Winegar v. Smith Investment Co., 590 P.2d 348 (Utah 1979), and any ambiguity must be apparent on the face of the written agreement; merely because the parties disagree as to its meaning does not render an agreement ambig-

uous. In re the Marriage of Anderson, 711 P.2d 699 (Colo. App. 1985).

A contract is ambiguous when the meaning or application of words in the contract are doubtful or uncertain. Winegar v. Smith Investment Co., supra. A review of the Listing Agreement reveals no such ambiguity.¹

The Listing Agreement was read and signed by McCoy, an attorney and experienced developer, in his capacities as President of the Domcoy Corporation and as a General Partner of the Domcoy Partnership. R. 153, p. 44. McCoy had the burden not only to read, but also to understand, the Listing Agreement before he

¹ The Listing Agreement provides, in relevant part:

In consideration of [Gump & Ayers] agreement to list the property . . . and to use reasonable efforts to find a purchaser or tenant therefore, [Domcoy Investors V and Domcoy Enterprises, Inc.] hereby grant[s] you for the period stated herein, from date hereof, the exclusive right to sell, lease, or exchange said property or any part thereof, at the price and terms stated herein, or at such other price or terms to which I may agree in writing.

During the life of this contract, if you find a party who is ready, willing and able to buy, lease or exchange said property or any part thereof, at said price and terms, or any other price or terms, to which I may agree in writing, or if said property or any part thereof is sold, leased or exchanged during said term by myself or any other party, I agree to pay [Gump & Ayers] a commission of 6% of such sale, lease or exchange price which commission unless otherwise agreed in writing shall be due and payable on the date of closing of the sale, lease or exchange.

. . .

signed it. Resource Management Company v. Western Ranch and Livestock Company, Inc., 706 P.2d 1028 (Utah 1985).

In the Listing Agreement, Domcoy agreed that a commission would be paid to Gump & Ayers if, and when, any one of the following conditions precedent occurred during its term ("Conditions"):

(1) Gump & Ayers produced a party who was ready, willing and able to buy the property at the listed price;

(2) Gump & Ayers produced a party who agreed to buy the Property at a price agreed to in writing by defendants;
or

(3) the Property was sold by Domcoy or any other party, at any price.

The Property was sold to a party who, concededly, was not produced by Gump & Ayers; nevertheless, Gump & Ayers is entitled to a commission since the Listing Agreement expressly provides for a commission in such event. Despite that provision, Domcoy argues that because a Listed Price and the term were omitted from the Listing Agreement, it is ambiguous and summary judgment was inappropriate. As will be demonstrated below, these omissions were not essential to enforcement of the Listing Agreement, nor do they render the Listing Agreement ambiguous.

1. The Omitted Listed Price does not Render the Listing Agreement Ambiguous. Domcoy contends that the omission of a Listed

Price from the Listing Agreement renders it ambiguous and, therefore, summary judgment was inappropriate. This contention is incorrect. The omission from the Listing Agreement of a Listed Price merely negated one of the Conditions precedent set forth in the Listing Agreement upon which a commission would be earned. In fact, the omission of a Listed Price inured to the benefit of Domcoy. By omitting a Listed Price, Gump & Ayers was deprived of the Listing Agreement's protection in the event they produced a "ready, willing and able" buyer but, for some reason, Domcoy refused to sell. Since there is no Listed Price against which a court could gauge the readiness, ability or willingness of a proposed buyer, the Property would have to be sold before a commission was earned.

A Listed Price is wholly inapplicable to sales embraced by the second or third Conditions set forth above. It follows that although the Property was sold to a party who was not produced by Gump & Ayers, a commission was earned since the Listing Agreement unambiguously provides for a commission in such an event.

2. The Omission of the Term does not Render the Listing Agreement Ambiguous. With respect to the Listing Agreement's omission of its term, courts have overwhelmingly held that agency relationships, which by definition are consensual, are terminable at will by either the principal or the agent, which power of termination is not affected by either an express or implied contract

between the parties that the agency is irrevocable. See e.g. McDonald Company v. Fishtail Creek Ranch Ltd. Partnership, 572 P.2d 195 (Mont. 1977), Peterson v. Peterson, 700 P.2d 585 (Kan. App. 1985); Ireland v. Wynkop, 539 P.2d 1349 (Colo. App. 1975). Granted, either the principal or the agent may sue the other for breach of the agency agreement based upon termination contrary to the agreement, but the agency relationship itself is terminable at will.

The foregoing principle was specifically applied to a real estate listing agreement without a definite period of duration in Jaudon v. Slink, 276 S.E. 2d 507 (N.C. App. 1981). In that case, the court held the listing agreement to be revocable at will by either party. Similarly, this Court applied the principle to an employment contract in its decision in the case of Bullocks v. Desert Dodge Truck Center, Inc., 11 Utah 2d 1, 354 P.2d 559 (1960). In Bullocks, it was held that:

Absent other controlling facts, it is generally recognized that under such a provision [a general statement in the employment contract that defendant agreed to employ plaintiff without any mention of term of employment] either party may terminate the employment at will.

11 Utah 2d at 4; 354 P.2d at 562. Thus, in this case, the parties' omission of the term of the Listing Agreement is not fatal to its enforcement, rather, such omission merely allowed Domcoy to terminate the Listing Agreement at any time.

Domcoy admits that it did not terminate or revoke the Listing Agreement before the sale of the Property. In his deposition, McCoy stated:

Q. At any time since July 1, of 1984, have you ever informed Ron Christensen that Gump & Ayers was not to proceed with the marketing of the Sterling Greenwald Building?

A. No.

Q. To your knowledge has anyone representing Domcoy told Ron Christensen of Gump & Ayers that he was not to proceed with the marketing of the Sterling Greenwald building?

A. No.

Q. Has anyone told Ron Christensen of Gump & Ayers that he was not to proceed with the marketing of the Sterling Greenwald Building?

A. No.

R. 153, p.55, 56.

Under such facts, and according to agency law, the District Court properly granted summary judgment entitling Gump & Ayers to its commission. The Listing Agreement is not ambiguous and expressly states that Gump & Ayers was entitled to a commission notwithstanding the fact that the property was sold to a party procured by the seller or some person rather than Gump & Ayers.

C. Any Ambiguities in the Listing Agreement were Properly Resolved by the District Court as a Matter of Law.

Even if this Court finds that the Listing Agreement was ambiguous because of the omission of its term or a Listed Price, the resolution of such ambiguities was a question of law for the District Court to resolve. Overson v. United States Fidelity & Guaranty Co., 587 P.2d 149 (Utah 1978); Petty v. Gindy Manufacturing Corp., 17 Utah 2d 332 404 P.2d 30 (1965). Before the District Court, Domcoy did not traverse the facts that McCoy signed the Listing Agreement in July of 1984, and that the Listing Agreement was never revoked. Such being the case, the District Court properly resolved any ambiguity as to when the Listing Agreement became effective by concluding, as a matter of law, that it became effective in July of 1984. In addition, any ambiguity as to the duration of the Listing Agreement was properly resolved by reference to the general agency principle that an agency relationship is revocable at will by either the principal or the agent, as discussed above, and that no such revocation occurred in this case.

Finally, perhaps the most important fact concerning the intent of the parties to the Listing Agreement is McCoy's candid admission in his deposition that if Gump & Ayers produced a buyer who bought either the entire building, or a portion thereof, after the Listing Agreement was signed, the six-percent (6%)

commission set forth in the Listing Agreement would have been paid. R. 153, pp. 39-40. This acknowledgement underscores the unambiguous intent of the parties to the Listing Agreement, and illuminates Domcoy's desire to treat the Listing Agreement as a legal buffet from which they can discriminately select the favorable provisions, such as Gump & Ayers marketing of the Property, while ignoring the distasteful provisions, such as their duty to pay a commission. The Utah decisions on the subject hold otherwise. Sellers may not take advantage of the services of a broker and, subsequently, disregard their liability to pay a commission based upon a non-essential infirmity in the Listing Agreement.

In Morris v. John Price Associates, Inc., 590 P.2d 315 (Utah 1979), the broker sought a commission arising from the lease of office space. The writing supporting the claimed commission was a letter written by the defendant to the plaintiff that merely stated the following: "This letter is to assure you that we will cover you on a six percent commission is a successful lease is negotiated with IBM on the second building on Meridian Park Office Building". This Court held that the letter was sufficient to entitle the broker to his commission despite the fact that the lease price, the duration of the agency and even the signature of the broker were omitted from the agreement.

Another Utah decision concerning the payment of a real estate commission is Taylor National, Inc. v. Jensen Brothers

Construction Company, 641 P.2d 150 (Utah 1982). In that case, the listing agreement was signed only by the owner and provided that the agent would be entitled to a six-percent commission on the sale of a house. This Court acknowledged that the agreement was undated and that the duration that the agreement was to remain in effect was omitted. Nevertheless, it was held that the listing agreement was enforceable and the payment of a commission was ordered. It was noted in the Taylor National decision that the actions of the parties showed that they intended to be bound by the Listing Agreement.

Similarly, in the present case, the actions of the parties indicated that they intended to be bound by the terms of the Listing Agreement. Gump & Ayers posted a sign on the Property and actively pursued steps in the marketing of the Property. Gump & Ayers referred interested parties to Domcoy and McCoy admitted in his deposition that if a buyer or tenant had been found by Gump & Ayers, a six-percent commission would have been paid to Gump & Ayers.

To summarize, the Listing Agreement was not ambiguous and did not lack any essential terms. McCoy, an attorney, read and presumably understood the Listing Agreement before he signed it. Although the Property was sold to a buyer produced by someone other than Gump & Ayers, a commission was due and payable to Gump & Ayers pursuant to the express provisions of the Listing Agree-

ment. Domcoy's attempts to argue otherwise should be viewed in light of this Court's advisory statement in the case of Kier v. Condrac, 25 Utah 2d 139, 478 P.2d 327, 330 (1970):

We recognize the validity of the rules relied upon by the defendants said to be enforceable a contract must be sufficiently definite in its terms that the party know what is required of them. But like all rules, which are necessarily stated in generality, it is only applicable in the proper circumstances, where the justice of the case requires as a shield to protect the party from injustice and not as a weapon with which to perpetrate injustice.

Gump & Ayers submits that an injustice would be perpetrated should Domcoy be allowed to escape the consequences of the Listing Agreement in which they agreed to pay a real estate commission.


CONCLUSION

Based upon the arguments set forth above, and the cases cited therein, this Court should affirm the District Court's Order granting summary judgment to Gump & Ayers on the grounds and for the reasons that the Listing Agreement is not ambiguous and Gump & Ayers is, therefore, entitled to a real estate commission as a matter of law.

DATED this 24th day of March, 1986.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that four (4) true and correct copies
of the above and foregoing Brief of Respondents were mailed, pos-
tage prepaid this 26th day of March, 1986, to:

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