

1986

Gump and Ayers Real Estate, Inc., a Utah corporation, and Victor C. Ayers, its designated real estate broker v. Domcoy Investors V, a California partnership, and Domcoy Enterprises, Inc., a Utah corporation and a general partner of Domcoy Investors V : Petition for Rehearing

Utah Supreme Court

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Recommended Citation

Legal Brief, *Gump & Ayers Real Estate, Inc. v. Domcoy Investors V*, No. 198621008.00 (Utah Supreme Court, 1986).
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UTAH SUPREME COURT
BRIEF

UTAH
DOCUMENT

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1986
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IN THE SUPREME COURT
OF THE STATE OF UTAH

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

Plaintiffs and :
Respondents, :

-vs-

Case No. 21008

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

Defendants and :
Appellants. :

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APPELLANTS' PETITION FOR RECONSIDERATION
OF PER CURIAM DECISION OF
THE SUPREME COURT OF THE STATE OF UTAH
JANUARY 29, 1987

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FILED
FEB 13 1987

Clerk, Supreme Court, Utah

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STATEMENT OF ISSUES
ON PETITION FOR RECONSIDERATION

1. Did the per curiam decision of the court violate established standards of review for summary judgments or intend to overrule all prior decisions for the review of summary judgments?

2. Will public policy and the cases cited support the per curiam decision?

ARGUMENT

POINT I.

THE PER CURIAM DECISION WITH RESPECT TO WHICH RECONSIDERATION
IS SOUGHT VIOLATES ESTABLISHED STANDARDS OF REVIEW
FOR SUMMARY JUDGMENT AND OVERRULES ALL PRIOR
DECISIONS FOR REVIEW OF SUMMARY JUDGMENTS

With all due respect to the court, the per curiam decision contains very serious mischaracterizations of the record, is internally inconsistent and appears to be based on deviations from the record and numerous misstatements. Beginning with the first sentence of the decision, the court characterizes the document in controversy as an "agreement"; the question of whether an agreement exists is the ultimate issue in controversy.

In the second sentence of the first paragraph of page 2 of the decision, the court again characterizes the document as an

agreement.¹ Thereafter, the court continuously refers to the document at issue as an "agreement". The nature of the document is the ultimate factual issue in this case and the decision demonstrates that the court is not construing the evidence of the appellants as fact or in the light most favorable to the appellants. This apparent reversal of the established standard of review for summary judgments will lead the bar to confusion as a dramatic change in Utah law.

Factual issues do exist: (1) McCoy testified in his deposition that the blank form is not an agreement to pay a commission, that no commission was discussed and that the form was signed as requested by the respondents only as a precondition to place a sign on the building; and (2) McCoy's deposition, the responses to requests for admissions and notes of respondent's agent (Christensen) show no commission agreement was reached or discussed in direct conflict with respondents' testimony. The court finds that the appellants were at fault for failing to file counter affidavits to respondents' affidavit in support of summary judgment. McCoy's testimony (cited by the court) raises the issue of whether the parties intended to enter any contractual relationship.

Under prior law, this court must view the evidence before it

¹ "Christensen met several more times with McCoy, and according to McCoy, in July of 1984, McCoy executed plaintiffs' exclusive listing agreement."

in the light most favorable to appellants.² Under the former standard, the statements of McCoy are considered as fact. If McCoy's statements are fact, there can be no agreement.

The court can construe the agreement as a matter of law where the contract terms are complete, clear, and unambiguous.³ The contract terms here are not complete; nothing could be more incomplete than a blank duration in a listing agreement, particularly where the real estate agent admittedly failed to inform the consumer that the blank duration means that the listing could be revoked at any time.

POINT II.

PUBLIC POLICY AND THE CASES CITED BY THE COURT DO NOT SUPPORT THE DECISION

All of the cases cited by the court are cases where factual issues required a trial to determine what the blanks in the document in controversy should mean in view of the intent of the parties.

The court relies on its earlier decision in Taylor Nat.,

² See Kidman v. White, 378 P.2d 898 (Utah 1963); Amjacs Interwest, Inc. v. Design Associates, 635 P.2d 53 (Utah 1981); Tangren v. Ingalls, 367 P.2d 179 (Utah 1961); Jensen v. Mountain States Tel. & Tel. Co., 611 P.2d 363 (Utah 1980).

³ See Per curiam decision, at page 1, ¶2, citing Colonial Leasing v. Larsen Bros., 49 Utah Adv. Rep. 4 (December 22, 1986).

Inc. v. Jensen Bros. Const. Co.⁴ (an appeal after trial), for the proposition that the absence of a specified duration in a listing agreement is not sufficient to render it unenforceable. The case stands for the proposition that, where the evidence presented at trial shows a meeting of the minds and a clear intent to contract, the term of the agreement can be determined at trial. The Taylor decision is replete with references to the evidence "adduced at trial" to support the agreement.

Chumney v. Stout,⁵ holds a broker earns a commission if a valid agreement exists when the listed property is sold to a party not procured by the broker. Appellants agree with Chumney, but in this case there is no agreement.

Chumney was based in large part on Andreason v. Hansen,⁶ wherein the court stated:

[I]t is to be kept firmly in mind, that the courts recognize the rights of parties freely to contract and are extremely reluctant to do anything which will fail to give full recognition to such rights. [Emphasis added]

It is the position of appellants no agreement was reached.⁷

⁴ 641 P.2d 150 (Utah 1982)

⁵ 14 Utah 2d 202, 381 P.2d 84 (1963)

⁶ 8 Utah 2d 370, 335 P.2d 404 (1959)

⁷ See Appendix, Item 1, Deposition of Michael McCoy. McCoy, who signed the blank form, was not authorized by the corporate general partner, nor by the limited partnership, to enter into such an agreement.

The per curiam decision denies appellants the opportunity to present evidence to a trier of fact to have the intent of the parties weighed and determined.

In Chumney, as in the Taylor case, a decision was rendered after trial. Appellants urge reconsideration because the evidence is in conflict, no trial was held, the duration of the document is blank, the evidence shows a specific lack of intent to contract, and no trier of fact has considered the issue of the respondents representations, or lack thereof, as to a "meeting of the minds".

The court relies upon Faulkner v. Farnsworth,⁸ and Docutel Olivetti Corp. v. Dick Brady Systems, Inc.;⁹ this reliance is misplaced.

Faulkner, supra, was a contract dispute which had previously been remanded for trial after summary judgment was granted.¹⁰ The more recent Faulkner decision was before the court on the issue of the propriety of an award of attorney's fees after trial on the merits.

Docutel, supra, was a contract dispute on which terms of an

⁸ 714 P.2d 1149 (Utah 1986).

⁹ 48 Utah Adv. Rep. 18 (Dec. 22, 1986).

¹⁰ 665 P.2d 1292 (Utah 1983).

inconsistent contract control.

The cases relied upon by the court in affirming the lower court are not appropriate or applicable where summary judgment was granted.

A strong underlying public policy for the establishment of the State of Utah Division of Real Estate is protection of the public. Substantial penalties are imposed on real estate agents and brokers who violate licensing procedures and requirements because of the quasi-legal practice aspects of the use of forms.¹¹ The type of form used here falls within the ambit of the Statute of Frauds, not the less restrictive common law of contracts.

The rationale behind this public policy is quite simple. It is designed to promote explicit, fair practices in the real estate business.¹² It is specifically designed to prevent a party from being compelled by incomplete, false or misleading statements to be held liable for a contract which he never

¹¹ See Utah Code Annotated, §§ 61-2-11, 61-2-12 and 61-2-17 (1953, as amended).

¹² See, e.g., Milholin v. Vorhies, 320 N.W.2d 552 (Iowa 1982); Red Carpet-Barry & Assoc. v. Apex Associates, 635 P.2d 1224 (Ariz.App. 1981); Olson v. Neale, 570 P.2d 209 (Ariz.App. 1977); Dugan v. Jones, 615 P.2d 1239 (Utah 1980).

made.¹³

Under established rules of interpretation, ambiguous contracts must be construed against the party drafting the document. The form in controversy here is a standard listing form used by real estate brokers who can now enforce blank agreements without a trial if the per curiam decision is allowed to stand. The law is that the broker shall be deemed the author of the document.¹⁴

CONCLUSION

The decision as entered is manifestly unjust in that it fails to construe an incomplete contract against the author and imposes upon appellants substantial liability without allowing a determination by a trier of fact on the conflicting evidence as to the ultimate issue of the intent of the parties to contract.

Respectfully submitted this 13th day of February, 1987.

KAPALOSKI, KINGHORN & PETERS


GERALD H. KINGHORN
Attorneys for Appellants

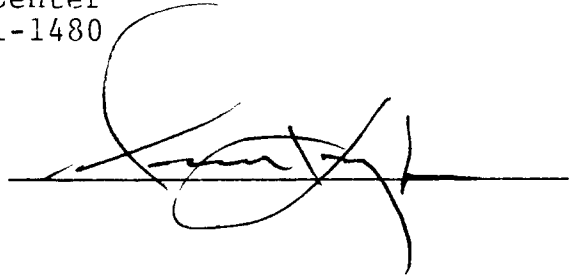
¹³ "A fixed and definite time limit also protects the property owner, by precluding the broker from claiming a commission on any sale that occurs after the expiration of the time limit. Caldwell v. Consol. Realty & Management Co., 668 P.2d 284, 287 (Nev. 1983).

¹⁴ See Insurance Agencies Co. v. Weaver, 604 P.2d 258 (Ariz. 1979); Caldwell v. Consol. Realty & Management Co., 668 P.2d 284 (Nev. 1983).

CERTIFICATE OF SERVICE

The undersigned hereby certifies that four (4) true and correct copies of the foregoing Petition for Reconsideration were mailed, postage prepaid, this 13th day of February, 1987, to the following:

David R. Olson, Esq.
Michael Allen, Esq.
SUITTER, AXLAND, ARMSTRONG & HANSON
Attorneys for Respondents
700 Clark Leaming Office Center
Salt Lake City, Utah 84101-1480

A handwritten signature in black ink, appearing to be "David R. Olson", is written over a horizontal line.

KKP3002

A P P E N D I X

1 agreement which is Deposition Exhibit 4, would the sales
2 price of the building have been \$5,857,000?

3 A. Yes.

4 Q. Was any commission paid on that sale?

5 A. Yes, there was.

6 Q. To whom and in what amount?

7 A. The individuals were Mike Parsons, Ty Winfield,
8 and I'm not sure of the other party or the amounts.

9 Q. Do you have a closing statement for the
10 transaction?

11 A. I do not, no. Mr. Kinghorn might have.

12 MR. OLSEN: Jerry, do you have a closing statement
13 we could look at?

14 MR. KINGHORN: I don't have one with me. It
15 doesn't show any commissions, however. I'll provide them
16 to you.

17 It doesn't show any commission, but when I come in
18 to question Mr. McCoy after you get through I'll clarify
19 that.

20 Q. (BY MR. OLSEN) Do you recall the approximate
21 amount of the commission?

22 A. There was a commission negotiated by Mr. Doms on
23 the entire purchase price of the property. I don't recall
24 the exact amount, but only a portion of it was paid at the
25 time of closing.

1 Q. Do you recall what the commission on the entire
2 property was, or an approximate amount of the commission?

3 A. I believe it was in the quarter of a million
4 dollars range. I don't know the specific figure.

5 Q. Directing your attention to Deposition Exhibit 1
6 which is a sales agency contract, when did you sign that
7 document?

8 A. There's no date on the document. I believe it was
9 in July of 1984. I don't recall a specific date.

10 Q. In the the Request for Admission served upon you,
11 you deny the existence of a contract relating to the sales
12 agency agreement?

13 A. Yes.

14 Q. Let me in particular refer you to the Request for
15 Admissions and your reply. The request reads -- this is
16 Request Number 4. "Admit that during the term of the
17 contract defendant Domcoy Investors V sold or leased or
18 exchanged the property to a third party."

19 The response is denied and in parentheses, "The
20 defendants deny that a contract existed between the
21 plaintiffs and defendants. The Domcoy Investors V project
22 was sold on December 31st 1984." Do you deny the existence
23 of a contract?

24 A. Yes, I do.

25 Q. Why is that?

1 A. Because at the time that my signature was placed
2 on this sheet of paper, it was merely to allow Gump & Ayers
3 to place a sign on the building as a leasing agent. There
4 were no specifics discussed as far as in terms of a listing,
5 sales price, term of lease, or anything like that. In fact,
6 decisions had not been made as to how the building was to
7 be marketed from a lease standpoint.

8 We had in the past entertained offers as far as
9 lease of space from other real estate firms; had granted,
10 you know, exclusive listings for single parties, like that.

11 It was our intent to allow Gump & Ayers to place a
12 sign on the building.

13 Q. For what purpose?

14 A. So that they could take referrals as far as
15 potential tenants for the building. Prior contact had been
16 made through either our architect or the builders working
17 on the building.

18 Q. Did you have discussions with Gump & Ayers
19 regarding this fact, that you didn't think that, regarding
20 your understanding of the sales agency contract?

21 A. At a previous discussion Mr. Doms had stated that
22 that if they wanted to put a sign on the building that was
23 fine, but -- and it was our intent that until we had more
24 concrete evidence as to how we were going to market it and
25 such and a marketing proposal for leasing was set up, that

1 this was to place a sign on the building and entertain, you
2 know, on a ~~case-by-case~~ basis what the -- you know, if the
3 tenant was interested, and see if some sort of a lease
4 could be worked out.

5 Q. If a lease could have been worked out in that
6 scenario, would a commission have been paid to Gump & Ayers?

7 A. Yes.

8 Q. Did you discuss the possibility of sales of floors
9 or a portion of the building?

10 A. We had made Gump & Ayers aware that the building
11 had been condominiumized or was in the process of being
12 condominiumized, and I believe at one time Ron Christensen
13 had stated that -- would we entertain the sale of the
14 entire building; and we had said we'd entertain an offer on
15 either condominium space or the sale of the entire building,
16 but we weren't in a position to make any specific
17 determinations as to what price, what amount, or whatever.

18 Q. If you accepted an offer under that scenario,
19 would you contemplate that a commission would have been
20 paid to Gump & Ayers?

21 A. If Gump & Ayers brought -- brought us somebody to
22 buy a floor of the building or the whole building, or to
23 lease a space, a commission would be negotiated as it would
24 be with any of the other leasing agents that had previously
25 brought us individuals that had been interested and we had

1 given exclusive single party listings to.

2 Q. Would the commission have been six percent of the
3 sale, lease, or exchange price?

4 A. I believe that would have -- unless it was --
5 unless it was negotiated at the time of, you know, the
6 offer being presented to us, I believe six percent was --
7 it's the figure listed in this -- it's the one figure typed
8 into this piece -- on this piece of paper. Six percent is
9 a normal commission to be paid in something like that.

10 Q. Okay. Mr. McCoy, if you would -- I'd like you to
11 take your time, but I'd like you to tell me each and every
12 fact upon which you're basing your judgment that you are
13 not obligated to pay a commission under this sales agency
14 contract which has been marked as Deposition Exhibit 1.

15 A. The primary reason is because to me there's no
16 beginning date, there's no ending date, there's no term,
17 there's no price or anything listed on the sheet of paper,
18 and as such under California law it would not be a binding
19 listing agreement, because under California law where
20 there's no beginning date and no specified period of
21 listing, an agency agreement is unenforceable.

22 I don't think there's a valid contract on the face
23 of the document, so it was merely something that we signed
24 so that they could place a sign on the building.

25 Q. And what was the purpose of the sign on the

1 building: to attract interest?

2 A. To channel interest to someone who could then
3 refer potential tenants to us.

4 Q. Are there any other facts upon which you rely to
5 support your judgment that there is no contract or
6 agreement relating to a commission?

7 A. I'd say just the overall dealings with Gump &
8 Ayers and other real estate companies that we had signed
9 exclusive single party listings with.

10 During that period of time we were unclear as to
11 what could be done in the way of providing benefits for
12 potential tenants and what we really wanted to do, what was
13 the best way of dealing with the leasing up of the building,
14 and we had hired a law firm in California to do research on
15 this specific issue, and it wasn't until several months
16 later that any type of specific conclusions were made by
17 this law firm.

18 Q. You testified that you signed the agreement in
19 roughly July of 1984?

20 A. To the best of my knowledge, yes.

21 Q. And at that time you understood that Gump & Ayers
22 would place a sign on the building?

23 A. Yes.

24 Q. Was there a sign on the building prior to the time
25 the sales agency contract was signed by you?

1 A. I don't recall.

2 MR. OLSEN: Let me talk -- let's go off the record
3 and let me talk with my client and I think that will
4 probably finish my questions.

5 (There was a short break taken.)

6

7

EXAMINATION

8

BY MR. KINGHORN:

9 Q. Mr. McCoy, earlier in the deposition you were
10 asked some questions about the history of your experience
11 with land development. Were your answers based on your
12 best recollection about the times or the entities or the
13 names of the purchasers?

14 A. Yes.

15 Q. Could there be deviations in dates or entities
16 based on your incomplete recollection of those details at
17 this time?

18 A. Yes, there could be.

19 Q. And your answers were intended to be general, and
20 you believe they're generally correct?

21 A. Yes.

22 Q. All right. With reference to the sale of the
23 Sterling Building in December of 1984 and specifically the
24 terms of Deposition Exhibit Number 4, is there a mechanism
25 in that agreement for the purchase price to be adjusted;

1 specifically, based on the tax credits ultimately obtained
2 by the buyers and the balance due to Albuquerque Federal on
3 the construction loan?

4 A. Yes, there is.

5 Q. So that the purchase price could be somewhat less
6 than the amount stated on the first page of the document?

7 A. Yes, it could be.

8 Q. Mr. McCoy, were you authorized by Domcoy
9 Enterprises to enter into a listing agreement with Gump &
10 Ayers to sell the building?

11 A. There had been no specific authorization of that,
12 no.

13 Q. When you executed Deposition Exhibit 1, did you
14 intend to enter a listing agreement with Gump & Ayers which
15 would bind Domcoy or the limited partnership to pay a
16 commission upon the sale of the building?

17 A. No.

18 Q. Did Mr. Christensen tell you specifically that
19 Exhibit 1 was only to allow Gump & Ayers to place or
20 maintain the sign on the building?

21 A. I don't recall if it specifically stated that, but
22 in our conversation over lunch on -- during the meeting we
23 had signing this thing, that was the impression that I got.

24 Q. Was that the prime purpose in your mind for
25 executing the document?