

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 : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Gerald H. Kinghorn; Kapaloski, Kinghorn and Peters; Attorneys for Defendants.

David R. Olsen; Michael L. Allen; Switter, Axland, Armstrong and Hanson; Attorneys for Plaintiffs.

Recommended Citation

Brief of Appellant, *Gump and Ayers Real Estate, Inc. v. Domcoy Investors V*, No. 198621008.00 (Utah Supreme Court, 1986).
https://digitalcommons.law.byu.edu/byu_sc1/1501

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

**UTAH SUPREME COURT
BRIEF**

UTAH
DOCUMENT
K F U
45.9
.S9
DOCKET NO. 1986 21008

IN THE SUPREME COURT
OF THE STATE OF UTAH

--oo0oo--

GUMP & AYERS REAL ESTATE, INC.,
a Utah corporation, and VICTOR C.
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.

No. 21008

CATEGORY 13-B

--oo0oo--

BRIEF OF APPELLANTS

APPEAL FROM JUDGMENT AND ORDER OF THE
THIRD JUDICIAL DISTRICT COURT, HONORABLE DAVID B. DEE,
OF OCTOBER 8, 1985

DAVID R. OLSON, #2458
MICHAEL L. ALLEN, #0047
SUITTER, AXLAND, ARMSTRONG & HANSON
700 Clark Leaming Office Center
175 South West Temple
Salt Lake City, Utah 84101-1480
Attorneys for Plaintiffs and
Respondents

GERALD H. KINGHORN, #A1825
KAPALOSKI, KINGHORN & PETERS
9 Exchange Place, Suite 1000
Salt Lake City, Utah 84111
Attorneys for Defendants and
Appellants

FILED

FEB 21 1986

Clerk, Supreme Court, Utah

IN THE SUPREME COURT
OF THE STATE OF UTAH

--oo0oo--

GUMP & AYERS REAL ESTATE, INC.,
a Utah corporation, and VICTOR C.
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.

No. 21008

--oo0oo--

BRIEF OF APPELLANTS

APPEAL FROM JUDGMENT AND ORDER OF THE
THIRD JUDICIAL DISTRICT COURT, HONORABLE DAVID B. DEE,
OF OCTOBER 8, 1985

DAVID R. OLSON, #2458
MICHAEL L. ALLEN, #0047
SUITTER, AXLAND, ARMSTRONG & HANSON
700 Clark Leaming Office Center
175 South West Temple
Salt Lake City, Utah 84101-1480
Attorneys for Plaintiffs and
Respondents

GERALD H. KINGHORN, #A1825
KAPALOSKI, KINGHORN & PETERS
9 Exchange Place, Suite 1000
Salt Lake City, Utah 84111
Attorneys for Defendants and
Appellants

TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF ISSUES ON APPEAL	1
DETERMINATIVE STATUTES.	1
STATEMENT OF THE CASE	1
STATEMENT OF FACTS.	1
SUMMARY OF ARGUMENT	3
ARGUMENT:	
POINT I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF PLAINTIFFS/RESPONDENTS BECAUSE THE FACTUAL DISPUTES RAISED BY APPELLANTS ARE SUFFICIENT TO PRECLUDE SUMMARY JUDGMENT . . .	5
CONCLUSION.	8
CERTIFICATE OF SERVICE.	8
ADDENDUM I: Listing Agreement	9

TABLE OF AUTHORITIES CITED

	<u>Page</u>
<u>Amjacs Interwest Inc. v. Design Associates,</u> 635 P.2d 53 (Utah 1981)	5
<u>Faulkner v. Farnsworth,</u> 665 P.2d 1292 (Utah 1983)	7
<u>Hellstrom v. Osguthorpe,</u> 455 P.2d 18 (Utah 1969).	7
<u>Holbrook Company v. Adams,</u> 542 P.2d 191 (Utah 1975)	6, 7
<u>Jackson v. Dabney,</u> 645 P.2d 613 (Utah 1982)	6
<u>Jensen v. Mountain States Telephone & Telegraph Co.,</u> 611 P.2d 363 (Utah 1980).	5
<u>Kidman v. White,</u> 378 P.2d 898 (Utah 1963.	5, 7
<u>Livingston Industries, Inc. v. Walker Bank & Trust Co.,</u> 565 P.2d 1117 (Utah 1977)	5
<u>Northern Contracting Co. v. Allis-Chalmers,</u> 573 P.2d 65 (Ariz. 1977).	5, 6
<u>Tangren v. Ingalls,</u> 367 P.2d 179 (Utah 1961).	5, 7

STATEMENT OF ISSUES ON APPEAL

Were there sufficient material facts at issue such that the trial court erred in granting summary judgment in favor of plaintiffs?

DETERMINATIVE STATUTES

Utah Rules of Civil Procedure, Rule 56

STATEMENT OF THE CASE

The matter in controversy involves a real estate listing/blank form which was signed by a representative of defendants/appellants. It was, and is, the contention of appellants that, because material terms of the form were intentionally left blank, the intent of the parties in executing the agreement is a question of fact not properly resolved through summary judgment.

Cross motions for summary judgment were filed by the parties and argued on August 30, 1985. On October 8, 1985, the Third Judicial District Court, in and for Salt Lake County, State of Utah, Honorable David B. Dee, entered an order granting summary judgment in favor of plaintiffs/respondents.

Because no findings of fact and conclusions of law were entered by the court, it is unclear upon what basis the court found there were no genuine issues of fact justifying summary judgment.

STATEMENT OF FACTS

1. The real property covered by the blank form which is the subject matter of the litigation was sold on December 31, 1984.

2. The purchaser of the property was not a purchaser generated as a result of any action on the part of respondents. See, Plaintiffs' Memorandum in Support of Motion for Summary Judgment, p. 3.

3. The individual representatives of the parties involved were Ronald Christensen (hereinafter "Christensen") in behalf of respondents and Michael R. McCoy (hereinafter "McCoy") in behalf of appellants. See, Addendum I, attached hereto and incorporated herein by this reference.

4. The document executed by Christensen and McCoy is a form agreement and certain material terms of the agreement were left blank; specifically, the date on which any agreement was to commence and a date upon which any agreement was to expire and be of no further force or effect. Further, the document fails to designate a listed price for the property. See, Addendum I.

5. McCoy was not authorized to enter into an exclusive listing agreement by appellants and stated under oath that he executed the document only to permit respondents to place a sign on the building to advertise its availability and not as an exclusive listing agreement. See, McCoy Deposition, p. 38, lines 1-7; p. 43, lines 8-12.

6. Christensen interpreted the listing to be a binding agreement which gave plaintiffs/respondents an exclusive listing on the property and was effective for an indefinite period of time. See, Christensen Deposition, p. 45, lines 18-20.

7. This action was initiated by the respondents and a hearing was held on cross-motions for summary judgment on August 30, 1985.

8. On October 8, 1985, the trial court entered its order deny-

ing appellants motion for summary judgment and granting the motion of respondents.

9. Appellants Notice of Appeal was timely filed on November 5, 1985.

SUMMARY OF ARGUMENT

Summary judgment is a drastic remedy which should be applied cautiously. The pleadings and documentary evidence before the court should be liberally construed in the light most favorable to the party opposing summary judgment.

The evidence before the trial court in this matter clearly indicated the presence of significant disputes as to facts which are material to resolution of this controversy; thus, the granting of summary judgment was inappropriate in this matter and the case should be remanded for further proceedings.

ARGUMENT

POINT I.

THE TRIAL COURT ERRED IN GRANTING SUMMARY
JUDGMENT IN FAVOR OF PLAINTIFFS/RESPONDENTS
BECAUSE THE FACTUAL DISPUTES RAISED BY APPELLANTS
ARE SUFFICIENT TO PRECLUDE SUMMARY JUDGMENT

The matter before the court is a contract dispute. Respondents claim that the listing form (Addendum I) constitutes a binding, enforceable agreement between the parties, despite the absence of what appellants assert are material terms.

In opposing respondents' motion for summary judgment, appellants raised the following issues:

1. Appellants argue that the form was signed merely as an accommodation to allow respondents to place a sign on the property; respondents argue that the listing form was intended to be a binding, exclusive agreement which would allow respondents to market the property and receive a commission.

2. Appellants assert that no commission was discussed either prior to or at the time the form was signed, primarily because appellants had not at that time determined whether the property was to be sold or leased or marketed in some other manner.

3. Appellants noted that no listing price was included in the form because no marketing strategy had yet been determined and the document was signed merely to allow respondents to place their sign on the building in an effort to ascertain interest in the property.

4. Appellants argue that, absent a definite term in and form there is no discernible way in which it can be determined that the property was sold during the time when the contract was in force.

Because of the conflicting testimony and evidence concerning the intent of the parties in executing the form and in absence of such fundamental terms as the listing price and the exact terms during which the listing would be enforceable, the effect of the summary judgment granted by the trial court was to "fill in the gaps" and create an enforceable contract where none existed.

In determining whether to grant a motion for summary judgment, the task of the trial court is to examine the pleadings, depositions, answers to interrogatories, admissions and the affidavits on file and ascertain from the pleadings and exhibits whether a genuine issue of

material fact exists. If a dispute as to any material fact is evident, summary judgment may not be granted.

This court has held that cross motions for summary judgment do not, in and of themselves, resolve factual issues. In Amjacs Interwest, Inc. v. Design Associates, 635 P.2d 53 (Utah 1981), the court stated:

"As an initial consideration, we note that the filing of cross-motions for summary judgment does not mean that this case may be finally disposed of as a matter of law. Cross-motions for summary judgment do not ipso facto dissipate factual issues, even though both parties contend for the purposes of their motions that they are entitled to prevail because there are no material issues of fact."

635 P.2d at 55

It is well established that summary judgment should only be invoked in cases where it clearly appears, from the record before the court that the moving party has established his right to judgment, beyond a doubt. See, Amjacs Interwest, Inc. v. Design Associates, *supra*; Tangren v. Ingalls, 367 P.2d 179 (Utah 1961); Jensen v. Mountain States Telephone & Telegraph Co., 611 P.2d 363 (Utah 1980); Livingston Industries, Inc. v. Walker Bank & Trust Co., 565 P.2d 1117 (Utah 1977).

In deciding a motion for summary judgment, the court must consider factual inferences as tending to show triable issues of material fact in the light most favorable to the existence of such issues. See, Kidman v. White, 378 P.2d 898 (Utah 1963); Northern Contracting Co. v. Allis-Chalmers Corp., 573 P.2d 65 (Ariz. 1977). The district court failed to do so in this case.

To successfully defeat a motion for summary judgment, the oppos-

ing party must only bring to light specific facts which present a genuine issue for trial which, if resolved in favor of the nonmoving party, would entitle him to prevail. Indeed, summary judgment is only appropriate in those situations where there is no set of facts which, if proved, would allow the nonmoving party to succeed. See, Jackson v. Dabney, 645 P.2d 613 (Utah 1982). Here appellants clearly demonstrated

that in order to prevail, the respondents must show the property was sold within the term of a listing; since no one knew the term, the court could see or should have been able to see that an issue of fact exists.

In the case of Holbrook Company v. Adams, 542 P.2d 191 (Utah 1975), this court noted that:

" . . . [I]t only takes one sworn statements under oath to dispute the averments on the other side of the controversy and create an issue of facts. This is analogous to the elemental rule that the fact trier may believe one witness as against many, or many against one."

542 P.2d 191, 193

The court went further in Holbrook, supra, holding that if there is any dispute as to an issue material to resolution of the controversy, summary judgment should not be granted. 542 P.2d 191, 193. It is undisputed that the signed deposition of McCoy qualified as a sworn statement in dispute of the facts claimed by the plaintiffs. As more fully discussed below, defendants/appellants in this action raised sufficient disputes as to material facts to preclude the granting of summary judgment.

As noted by the court in Northern Contracting Co. v. Allis-Chalmers Corp., 573 P.2d 65 (Ariz. 1977), in considering a motion for

summary judgment, neither the trial court, nor the appellate court may weigh the evidence presented and if conflicting inferences can be drawn from the circumstances, summary disposition is unwarranted. Id. at 67. See, also, Tangren v. Ingalls, 367 P.2d 179, 185 (Utah 1961); Holbrook Company v. Adams, 542 P.2d 191, 193.

Specifically dealing with cases in which the written contract was alleged to have been ambiguous, this court has consistently held that where the contract itself contained uncertain or missing terms, evidence on the intent of the parties was both permissible and appropriate in resolving the controversy. See, Faulkner v. Farnsworth, 665 P.2d 1292, 1293 (Utah 1983); Hellstrom v. Osguthorpe, 455 P.2d 28, 29 (Utah 1969); Kidman v. White, 378 P.2d 898, 899 (Utah 1963).

The situation confronting the trial court in this case involved a written form in which certain materials terms, i.e. the listing price and the term of the agreement, were omitted. The averments of the parties as to why those terms were omitted differs significantly.

Of particular significance in the instant case is the omission of an effective term during which the purported agreement would be in force. Appellants urged in their opposition to respondents' motion for summary judgment that without this material term, it is impossible to determine whether or not a commission is due in that it is impossible to determine whether the sale took place during a period of time when the agreement was in effect. If the effective term of the agreement had terminated prior to consummation of a sale, no commission would be due to respondents. Without findings and conclusions, we can only assume that the court below did not consider this pivotal issue to be

material to resolution of the controversy.

The trial court, in error, disregarded all conflicting averments and entered summary judgment. Appellants are entitled to further proceedings at which the evidence relating to the dispute may be weighed by a trier of fact and an equitable determination made.

CONCLUSION

The trial court had before it information sufficient to evidence genuine issues as to material facts in this controversy. Those issues are more than adequate to preclude the granting of summary judgment in respondents' favor. The judgment of the trial court should be reversed and the matter remanded for trial.

Respectfully submitted this 21st day of February, 1986.

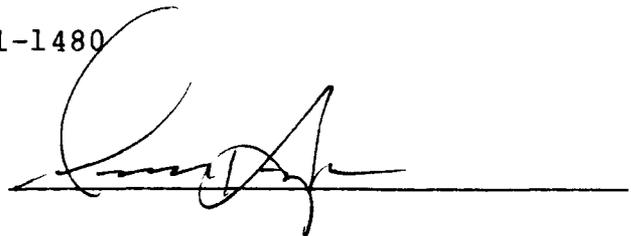


GERALD H. KINGHORN
KAPALOSKI, KINGHORN & PETERS
Attorneys for Appellants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that four (4) true and correct copies of the foregoing Brief of Appellants was mailed, postage pre-paid, this 21st day of February, 1986, to the following:

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



ADDENDUM I

An enlargement of this form is included on the following page

SALES AGENCY CONTRACT (Form A)

Member of Multiple Listing Service of Salt Lake Board of REALTORS®

In consideration of your agreement to list the property described on form B and to use reasonable efforts to find a purchaser or tenant therefor, I hereby grant you for the period stated herein, from date of 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, able and willing 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 the broker listed below a commission of _____% of such sale, lease or exchange price which commission unless otherwise agreed in writing shall be due and payable on the date of closing the sale, lease or exchange. Should said property be sold, leased or exchanged within _____ months after such expiration to any party to whom the property was offered or shown by me, or you, or any other party during the term of this listing, I agree to pay you the commission above stated if I am not obligated to pay a commission on such sale, lease or exchange to another broker pursuant to another sales agency contract entered into after the expiration date of this contract.

You are hereby authorized to accept a deposit as earnest money from any potential buyer on the property as described on the property description and informational form (form B). Said deposit to be held in a trust account.

I hereby warrant the information contained on the property description and informational form (form B) to be correct and that I have marketable title or an otherwise established right to sell, lease or exchange said property, except as stated. I agree to execute the necessary documents of conveyance or lease and to prorate general taxes, insurance, rents, interest and other expenses affecting said property to agreed date of possession and to furnish a good and marketable title with abstract to date or at my option a policy of title insurance in the amount of the purchase price and in the name of the purchaser. In the event of sale or lease of other than real property, I agree to provide proper conveyance and acceptable evidence of title or right to sell, lease or exchange.

In case of the employment of an attorney to enforce any of the terms of this agreement, I agree to pay a reasonable attorney's fee and all costs of collection.

You are hereby authorized to obtain financial information from any mortgagee or other party holding a lien or interest on this property.

You are hereby authorized and instructed to offer this property through the Multiple Listing Service of the Salt Lake Board of REALTORS®.

You are hereby authorized to place an appropriate sign on said property.

This Sales Agency Contract may not be changed, modified or altered except by prior written instrument executed by the Principal Broker and the owner(s) shown below, except that the listed price shall be changed by written request received from the owner(s).

The parties hereto agree not to discriminate against any person or persons based on race, color, religion, sex or national origin in connection with the sale, lease or exchange of properties under this agreement.

LISTED PROPERTY 35 WEST BROADWAY
(Address)
SALT LAKE CITY, UTAH
(City) (State)

LISTED PRICE €
This contract is entered into this _____ day of _____, 19____.
This contract expires on the _____ day of _____, 19____.

Listing Company

Principal Broker (Insert Name)
BY _____
Authorized Agent (Signature)

Owner (Signature)

Owner (Signature)

Owner (Signature)

I hereby acknowledge receipt of completed copies of this document (Form A) and the property description and information form (Form B).

Owner