

2001

Wardley Better Homes and Garden v. Tracey Cannon and Cannon Associates, Inc., a Utah Corporation : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

WARDLEY BETTER HOMES and
GARDEN,

Plaintiffs/Appellees,

v.

TRACEY CANNON and CANNON
ASSOCIATES, INC., a Utah corporation,

Defendants/Appellants.

CASE NO.: 20010245-SC

PRIORITY NO.: 15

ORAL ARGUMENT REQUESTED

ADDENDUM TO BRIEF OF APPELLANTS

**ON APPEAL FROM A DECISION OF THE UTAH COURT OF APPEALS
AFFIRMING AN ORDER ENTERED BY THE THIRD JUDICIAL
DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
HONORABLE LESLIE A. LEWIS, DISTRICT JUDGE**

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②

IN THE SUPREME COURT OF THE STATE OF UTAH

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**ADDENDUM TO
BRIEF OF APPELLANTS**

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CERTIFICATE OF SERVICE

This will certify that on the 24th day of September, 2001, I caused to be mailed two (2) true and correct copies of the foregoing ADDENDUM TO BRIEF OF APPELLANTS to each of the following:

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Tab 1

IN THE SUPREME COURT OF THE STATE OF UTAH

---oo0oo---

Wardley Better Homes and Garden,
Respondent,

v.

No. 20010245-SC
20000128-CA
940907000

Leland Mascaro, Sheri Mascaro,
Tracy Cannon and Cannon Associates,
Inc., a Utah corporation,
Petitioner.

ORDER

This matter is before the court upon a Petition for Writ of Certiorari, filed pursuant to Rule 48, of the Utah Rules of Appellate Procedure.

IT IS HEREBY ORDERED that the Petition for Writ of Certiorari filed on March 19, 2001, by petitioner is granted.

FOR THE COURT:

Aug. 7, 2001
Date

Richard C. Howe

Richard C. Howe
Chief Justice

CERTIFICATE OF MAILING

I hereby certify that on August 9, 2001, a true and correct copy of the foregoing ORDER was deposited in the United States mail to the parties listed below:


STEVEN B. SMITH
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261 E 300 S STE 200
SALT LAKE CITY UT 84111

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and a true and correct copy of the foregoing ORDER was hand delivered to a personal representative of the courts listed below:

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PAULETTE STAGG
COURT OF APPEALS
450 S STATE ST
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SALT LAKE CITY UT 84114-0230

By 
Deputy Clerk

Case No. 20010245-SC
THIRD DISTRICT, SALT LAKE , 940907000

Tab 2

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

WARDLEY BETTER HOMES & GARDENS,	:	COURT'S RULING
Plaintiff,	:	CASE NO. 940907000
vs.	:	
LELAND J. MASCARO, SHERI	:	
MASCARO, and TRACEY CANNON,	:	
Defendants.	:	
LELAND J. MASCARO and	:	
SHERI MASCARO,	:	
Counterclaimaints,	:	
vs.	:	
WARDLEY BETTER HOMES & GARDENS,	:	
Counterdefendant.	:	
LELAND J. MASCARO and	:	
SHERI MASCARO,	:	
Third Party Plaintiffs,	:	
vs.	:	
RUTH MARY HANSEN and	:	
ARLES HANSEN,	:	
Third Party Defendants.	:	

A Notice to Submit having been filed, pursuant to Rule 4-501,
Code of Judicial Administration, in connection with defendant
Tracey Cannon's Motion for Summary Judgment and plaintiff's Motion

for Leave to File Amended Complaint, the Court having reviewed the Motions, Memoranda in Support and Reply Memorandum and the Memoranda in Opposition, and the Court being fully advised and finding good cause, rules as stated herein.

The Motion For Summary Judgment was filed first and is therefore considered first by this Court. The Motion for Summary Judgment is denied because there are material facts at issue, including what defendant, Cannon, knew or should have known and when she obtained any knowledge she had, etc.

The Motion to Amend Complaint is granted. It should be noted that this Court is not ruling on the viability of any of plaintiff's new claims. Plaintiff is urged to very carefully assess the facts and law and only file those claims that can be brought in good faith after a diligent exploration of the facts.

Plaintiff has ten days from the date of this Ruling to file the Amended Complaint and an Order consistent with this Ruling.

Dated this 9th day of October, 1996.

15
LESLIE A. LEWIS
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Court's Ruling, to the following, this 9th day of October, 1996:

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E. Matheson

Tab 3

AUG 28 1998

SALT LAKE COUNTY

By

Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

MEMORANDUM DECISION

CASE NO. 940907000

WARDLEY BETTER HOMES & GARDENS, :

Plaintiff, :

vs. :

LELAND J. MASCARO, et al., :

Defendants. :

LELAND J. MASCARO and SHERI
MASCARO, :

Counterclaimants, :

vs. :

WARDLEY BETTER HOMES & GARDENS, :

Counterdefendant. :

LELAND J. MASCARO and SHERI
MASCARO, :

Third Party Plaintiffs, :

vs. :

RUTH MARY HANSEN and ARLES HANSEN,

Third Party Defendants. :

This case came before the Court for trial beginning on June 8, 1998, and continuing through June 11, 1998. The Court having

received testimony and heard argument from counsel, ruled from the bench that the plaintiffs had not established a cause of action against defendant Tracy Cannon with respect to their claim that defendant Tracy Cannon's conduct violated the Utah Administrative Code. Specifically, the Court found that defendant Tracy Cannon's conduct was not unprofessional or unethical under the totality of the facts and circumstances and based upon the testimony of certain witnesses, including defendant Tracy Cannon and Rodney "Butch" Dailey, whom the Court found to be credible. The Court also ruled that the plaintiffs had not met their burden of proof in connection with their claim that defendant Tracy Cannon intentionally interfered with the plaintiff's prospective economic relations with respect to the Wetcor/Michael Ahlin deal, the Michael Brodsky/Hamlet Development deal and the Boulder deal (see factual discussion below). Further, the Court ruled that the plaintiffs had not met their burden of proof as to their claim that defendant Cannon's failure to remit the commissions on the sale of the defendant Mascaros' property to the plaintiff constituted conversion. The remaining issues raised in the Second Amended Complaint, the Counterclaim, and the Third Party Complaint were

taken under advisement by the Court for further, more in-depth consideration.

FACTUAL BACKGROUND

This Court finds that credible testimony adduced at trial, establishes the following facts. The Mascaros ("Mascaros") defendants and third-party plaintiffs, were first contacted by third-party defendant Arles Hansen ("Mr. Hansen") in the summer of 1993. Mr. Hansen, who represented himself to be the agent of the plaintiff and counterdefendant Wardley Better Homes & Gardens ("Wardley"), inquired whether the Mascaros were interested in selling approximately 128 acres of real property which is the subject of this lawsuit. Mr. Hansen informed the Mascaros that he was looking for property in that area for Michael L. Ahlin ("Mr. Ahlin"), President of Impact Development Corporation d/b/a Wetcor.

After his initial meeting with the Mascaros, Mr. Hansen met with defendant and third-party plaintiff Sheri Mascaro ("Mrs. Mascaro") and requested that she sign an Option agreement. Mrs. Mascaro signed, but did not date, the Option agreement (Plaintiff's Exhibit 1). The terms of this Option agreement included a 20 day duration and gave Mr. Hansen, and his wife, third-party defendant

Ruth Mary Hansen ("Mrs. Hansen"), or their assigns, the right to purchase the Mascaros' property.

When Mr. Hansen discovered that defendant and third-party plaintiff Leland Mascaro ("Mr.-Mascaro") was the actual owner of the property, he asked the Mascaros to sign a second Option agreement (Plaintiff's Exhibit 2). The terms of the second Option agreement, dated September 14, 1993, were identical to the first Option agreement and was signed by both the Mascaros. According to the trial testimony, it was also on this date that Mrs. Mascaro informed Mr. Hansen that Century 21 All West Inc. ("Century 21") had an exclusive listing agreement on the property. The Century 21 listing agreement (Plaintiff's Exhibit 30) had been signed by Mr. Mascaro on May 28, 1993, and provided for a six month duration. The Court found Mr. Hansen's testimony that he was not aware of the Century 21 agreement was lacking in credibility. To the contrary, the Court finds that the Century 21 agreement was disclosed to Mr. Hansen and that he requested Mrs. Mascaro to obtain a one-party exemption from Mr. Jerard Dinkelman, the principal broker under the Century 21 Agreement. Mrs. Mascaro obtained the exemption (Plaintiff's Exhibit 29) on September 14, 1993. This exemption was acquired before the second Option agreement was executed.

It further appears from the testimony that when Mr. Ahlin did not make an immediate offer, Mr. Hansen engaged in other actions with the Mascaros, including having them write a letter (Plaintiff's Exhibit 3), dated October 6, 1993, to put pressure on Mr. Ahlin to make the deal. Mrs. Mascaro conceded at trial that this letter, stating that she and her husband had been contacted by another developer offering earnest money on the parcels, was a fabrication.

On October 12, 1993, Mr. Ahlin made an offer on the property through a Real Estate Purchase Contract (Plaintiff's Exhibit 4) of the same date. In addition to the Real Estate Purchase Contract, Mr. Hansen prepared a Dual Agency Agreement (Plaintiff's Exhibit 4) which was signed by Mr. Ahlin and Mrs. Hansen. The Court finds this Agreement is significant because Mr. Hansen had continuously represented to the Mascaros that he was their agent exclusively. In addition, Mr. Rod Gordon testified that he was Mr. Ahlin's agent and that it was inappropriate for the Hansens to present a Dual Agency Agreement for Mr. Ahlin's consideration and signature. Also of significance is the Sales Agency Contract (Plaintiff's Exhibit 4) which the Hansens prepared for the Mascaros' signature. A handwritten notation on the top of this contract expressly states that

it is a single party listing and that the single party is Wetcor. All of these documents were sent to the Mascaros and to their legal counsel, Mr. Mitch Olsen. Mr. Olsen testified that he advised the Mascaros not to sign the documents and offered to draft an original real estate purchase contract which included a provision for commission to be paid to the Hansens in the event that Mr. Ahlin consummated the purchase of the property (Plaintiff's Exhibit 16). Based on Mr. Olsen's advice, the Mascaros did not act on Mr. Ahlin's offer but continued to negotiate with him. In addition, the testimony is clear that no listing agreement was ever executed or contemplated by the Mascaros at that time.

On November 14, 1993, Mr. Hansen came to the Mascaros' home with a number of documents. At this meeting, Mr. Hansen brought an Option Agreement (Defendant's Exhibit 89), a Limited Agency Disclosure Agreement (Plaintiff's Exhibit 26), a blank Real Estate Purchase Contract (Plaintiff's Exhibit 26), and four listing agreements ("Listing Agreements") with Salt Lake Board of Realtors Land Data Input Forms (Plaintiff's Exhibits 17 - 20). In his testimony, Mr. Hansen acknowledged that in preparing these documents the night before, he had predated many of them. The Court finds that Mr. Hansen's preparation of these documents was

unsolicited and that Mr. Hansen purposely met with the Mascaros on a Sunday without the presence of their legal counsel. It appears to the Court that Mr. Hansen's urgency in preparing these documents and having the Mascaros sign them was based on the expiration of the second Option agreement. It further appears from the Mascaros' testimony that Mr. Hansen's scheme was to have the Mascaros present an offer to Mr. Ahlin with the expectation that he would purchase a small portion of the acreage and agree to an option on the remainder of the land. However, because the Mascaros and Mr. Hansen did not yet know how many acres Mr. Ahlin would actually be willing to purchase, the principle terms of the Real Estate Purchase Contract were left blank. In addition, only the first of the four Listing Agreements contained an expiration date.

The Court finds that the first Listing Agreement (Plaintiff's Exhibit 17A), in its unaltered state, reflects the actual agreement between the Mascaros and Mr. Hansen. This Listing Agreement was set to expire on November 15, 1993, one day after Mr. Hansen's Sunday meeting with the Mascaros. The Court finds that Mr. Hansen altered the date on this Listing Agreement from November 15, 1993 to November 15, 1994. This finding is based on the credible testimony of the Mascaros and the Court's comparison of documents

where changes are initialed (See Plaintiff's Exhibit 26), with the Listing Agreement marked as Plaintiff's Exhibit 17A, where the change in the expiration date has no initials. The Court further finds that with respect to the other three Listing Agreements, which were blank with respect to the expiration dates, these were filled in by Mr. Hansen, subsequent to the Mascaros' signature, with "November 14, 1994" dates. The credible testimony established that Mr. Hansen's conduct in changing and/or writing in the expiration dates, was engaged in without the knowledge and the approval of the Mascaros. In addition, the dates alluded to and written by Mr. Hansen were contrary to the parties' agreement and clear understanding that the Listing Agreements would expire in one day.

This Court also finds that Mr. Ahlin did subsequently sign both the Option Agreement and the Real Estate Purchase Contract, and Mrs. Hansen accepted an earnest money check for \$4,000. Further, it is clear that the deal between the Mascaros and Mr. Ahlin subsequently failed. After an attempt to arbitrate the matter of the earnest money, the title company released the \$4,000 earnest money to Mr. Ahlin's assignees.

This Court also finds that around this same time, another potential purchaser of the property, Michael Brodsky, President of Hamlet Development, began to negotiate with the Mascaros. Mr. Brodsky testified that he proposed purchasing the property in stages and thought that he and the Mascaros had reached a verbal agreement on the sale. . However, before the agreement was finalized, Mr. Brodsky was informed by the Mascaros that a sale of the property had occurred. In September 1994, the Mascaros signed a one year listing agreement with defendant Cannon Associates. In October 1994, the Mascaros signed a Real Estate Purchase Agreement agreeing to sell the property to defendant Tracey Cannon ("Ms. Cannon"). The Mascaros and Ms. Cannon closed on this property on May 11, 1995. Ms. Cannon received a commission from the sale of \$115,338.16.

LEGAL ANALYSIS

The Court determines that the listing agreements entered into between Wardley and the Mascaros are voidable because they were secured by fraud in the inducement.

In its Second Amended Complaint, Wardley claims that the Mascaros have breached their Listing Agreements with Wardley by refusing to pay Wardley the 7% commission provided for in the Listing Agreements upon the sale of the property to Ms. Cannon.

Wardley argues that the sale to Ms. Cannon was entered into within the one-year term of the Listing Agreements. According to Wardley, when the sale on the property to Ms. Cannon closed, the contractual requirements for Wardley's earned commission had been satisfied.

In their Counterclaim and Third Party Complaint against Wardley and the Hansens, the Mascaros contend they were induced to sign the Listing Agreements in reliance on false representations made to them by Mr. Hansen. The representations which the Mascaros claim were fraudulent are: (1) that Mr. Hansen told them that he would only receive a commission for the sale of the Mascaros' property to Wetcor if they signed the Listing Agreements and (2) that the Listing Agreements would be valid for only one day and would apply only to the Wetcor purchase. The Mascaros also claim that Wardley breached its contract with them by failing to list the property on the MLS, and by failing to appropriately market the property.

Under Utah law, a person may rely upon positive assertions made by another, Dugan v. Jones, 615 P.2d 1239, 1247 (Utah 1980), and fraud in the inducement may allow the injured party to avoid the contract. Berkely Bank for Cooperatives v. Meibos, 607 P.2d

798, 801-04 (Utah 1980). The nine essential elements of fraudulent inducement (fraud) are:

"(1) that a representation was made; (2) concerning a presently existing material fact; (3) which was false; (4) which the representor either (a) knew to be false or (b) made recklessly, knowing that he had insufficient knowledge upon which to base such representation; (5) for the purpose of inducing the other party to act upon it; (6) that the other party, acting reasonably and in ignorance of its falsity; (7) did in fact rely upon it; (8) and was thereby induced to act (9) to his injury and damage."

Meibos, 607 P.2d at 800.

The Court determines that the Mascaros have proven fraudulent inducement because they have presented evidence supporting all of its elements. This Court finds most significant the fact that there are inconsistencies between the written terms of the Listing Agreements and the Mascaros' expressed intention to limit Mr. Hansen's representation to the Ahlin/Wetcor deal and to limit the duration of his representation to one day. These inconsistencies can only be reconciled with a finding that Mr. Hansen fraudulently represented that the Listing Agreements would be limited to one-party and would expire in one day to induce the Mascaros to sign the Listing Agreements. As part of his fraudulent scheme, the

Court finds that Mr. Hansen altered the November 15, 1993, date which was originally found on the first Listing Agreement and added expiration dates to the remaining three Listing Agreements to reflect an unagreed and unintended one-year duration. It appears Mr. Hansen unilaterally modified the Listing Agreements to improperly expand the scope of his representation beyond that contemplated by the Mascaros. The Court finds that Mr. Hansen's modifications were made without the Mascaros' knowledge and at a time when they did not have counsel available on the benefit of necessary legal advice. Based on the Mascaros' testimony, which the Court found to be credible, they were induced into signing incomplete drafts of the Listing Agreements during a Sunday meeting, when their legal counsel was apparently unavailable, because of Mr. Hansen's representation that it was the only way for him to receive a commission on the deal and his assurances that the final version of the Listing Agreements would contain the limitations they had discussed. In addition, the Mascaros' testified that they failed to take any additional precautions such as filling out the blank spaces because of their belief that Mr. Hansen had their best interests in mind. On this topic, the Court found Mrs. Mascaro's statement that "blind trust walked in and care

walked out" to be a particularly compelling statement concerning the Mascaros' reliance upon Mr. Hansen's representations and the opportunity for deception by Mr. Hansen. The Court finds that Mr. Hansen took full advantage of this opportunity by arriving for a hastily scheduled meeting with the Mascaros, whom Mr. Hansen knew to be represented by legal counsel, on a Sunday, when counsel would be unlikely to be available.

Overall, the Court found that the Mascaros' belief that they were operating under a one-day, one-party listing agreement was corroborated by documents received into evidence and the totality of credible trial testimony. For instance, the Sale Agency Contract (Plaintiff's Exhibit 4) presented to the Mascaros and signed by Mrs. Hansen imparts the Hansens' acknowledgment of the Mascaros' expressed intention to limit the Hansens' listing to "a single party listing . . . The single party is Wetcor." Further, the Court finds that Mr. Hansen was aware of the Century 21 Listing and was fully cognizant he could represent the Mascaros only if he could obtain a one-party exemption. Mr. Hansen's request that Mrs. Mascaro obtain a one-party exemption from Century 21 is congruent with the Mascaros' express reservations that their listing agreement with the Hansens be limited to the Ahlin/Wetcor deal and

with the Hansens' recognition that their representation had to be limited to one-party so as not run afoul of the Century 21 Listing. Next, it is significant to the Court that the change in the expiration date on the first Listing Agreement was not initialed. When compared to other documents where changes were initialed by the Mascaros, the lack of initials on the altered expiration date strongly suggests to the Court that the date was modified after the Mascaros signed this Listing Agreement and without their knowledge or permission. The Hansens' actions and the trail of documents speak loudly and convincingly that the Mascaros signed the Listing Agreements only because of Mr. Hansen's fraudulent misrepresentations and false assurances concerning the duration and scope of these agreements. In reaching this determination, the Court has given due consideration to all of the evidence, including the Mascaros' confessed lack of expertise in real estate matters and the particular facts surrounding Mr. Hansen's insistence that they sign the Listing Agreements on a Sunday, when they did not have access to their legal counsel. The existence of these proven facts in this case defeats Wardley's recovery upon the Listing Agreements. This Court concludes it would be inequitable, would be

unjust, and unlawful for this Court to enforce agreements, procured through fraudulent inducement.

The Court notes that there are also other possible grounds on which the Mascaros could avoid liability under the Listing Agreements, including the doctrine of mistake. However, since the Court finds that the Listing Agreements are voidable on the grounds of fraudulent inducement, the Court deems it unnecessary to consider alternative theories.

To summarize, the Court rules against Wardley on its claim that the Mascaros breached the Listing Agreements. Specifically, the Court rules that the Listing Agreements are unenforceable. Further, the Court rules against Wardley on its claim that Ms. Cannon interfered with Wardley's economic relations with respect to the Mascaros. Since the Listing Agreements were unenforceable, Wardley did not have viable economic relations with the Mascaros, with which Ms. Cannon could interfere.

With respect to the Mascaros' Counterclaim and Third-Party Complaint, the Court's ruling that the Listing Agreements are unenforceable renders moot the Mascaros' claim that they are entitled to attorney's fees and costs as specified within the terms of the Listing Agreements. In other words, in disaffirming the


terms of the Listing Agreements, the Mascaros cannot seek to selectively reinstate only certain portions of the Listing Agreements which are favorable to them. The same concept applies to the Mascaros' claim that Wardley breached the terms of the Listing Agreements. As stated previously, since fraudulent inducement has been proven, the terms of the Listing Agreement are not enforceable or binding on either the Mascaros or Wardley. In so ruling, the Court has essentially placed the Mascaros in the same position that they were in before the Listing Agreements were executed.

With respect to the Mascaros' claim for damages on fraud, it is this Court's view that the Mascaros have been restored to their former position by this Court's determination that the Listing Agreements are void. Moreover, while the Mascaros may have suffered emotional angst over the Hansens' conduct and whether their property would be sold, there is no evidence that this distress resulted in any compensatory damages. As a corollary, the Mascaros have not presented any evidence that they have suffered a pecuniary loss, particularly in light of their sale of the property to Ms. Cannon under more beneficial terms than were offered by the

Ahlin/Wetcor deal. Accordingly, the Court denies the Mascaros' claim for damages.

Counsel for the Mascaros is to prepare an Order and Findings consistent with, but not limited to the content of this Ruling within fifteen (15) days.

Dated this 28 day of August, 1998.



LESLIE A. LEWIS
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, postage prepaid, to the following, this 21 day of August, 1998:

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Tab 4

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APR 21 1999

By M. Snapp

**IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH**

WARDLEY BETTER HOMES & GARDENS,)	
)	ORDER DENYING
)	ATTORNEY'S FEES
Plaintiff,)	
v.)	
)	
LELAND J. MASCARO, SHERI MASCARO,)	
TRACEY CANNON and ASSOCIATES, INC.,)	Civil No. 940907000 CN
a Utah corporation,)	
)	
Defendant.)	Judge: Leslie A. Lewis
)	

Defendants Tracey Cannon and Cannon and Associates ("Cannon") and Defendants/Counterclaimants/Third Party Plaintiffs, Leland J. Mascaro and Sheri Mascaro ("Mascaros"), after a trial in the above matter, petitioned the Court for an award of attorney's fees from Plaintiff/Third Party Defendant, Wardley Better Homes and Gardens ("Wardley"), pursuant to Utah Code Ann. Section 78-27-56. Memoranda in support and in opposition to those Motions were filed and those Motions were submitted for decision. The Court having reviewed the Motions, Memoranda, and being fully informed, now makes and enters the following Findings of Fact, Conclusions of Law and Order:

FINDINGS OF FACT

1. Both Cannons and Mascaros claimed a right to attorney's fees pursuant to Section 78-27-56 (1) contending that Wardley's claims were meritless and asserted in bad faith.

2. Wardley's claims, however, were not "without merit."

3. Even though the listing agreements entered between Wardley and the Mascaros were voidable because of the misconduct of Arlis Hansen, the legality of the listing agreements consisted of mixed factual and legal questions which were not entirely clear. There was no evidence presented that Wardley independently knew of Mr. Hansen's fraudulent conduct, and there was evidence that Wardley strongly believed that it had a valid claim for unpaid commissions. The evidence indicated: (a) Wardley had an honest belief in the propriety of the activities in question; (b) Wardley did not intend to take unconscionable advantage of others; and (c) Wardley did not intend to or act with knowledge that its activities would hinder, delay, and defraud Cannon or the Mascaros.

CONCLUSIONS OF LAW

1. Cannon and Mascaros failed to demonstrate that Wardley's claims were "frivolous," or "of little weight or importance, having no basis in law or fact" as set forth in *Cady v. Johnson*, 671 P.2d 149, 151 (Utah 1983).

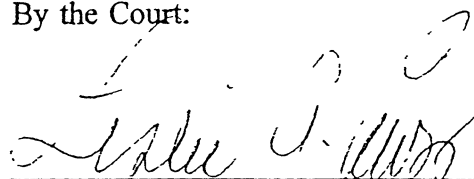
2. Wardley's Complaint was not asserted or pursued in bad faith.

3. The totality of facts and circumstances would make it inequitable to force Wardley to pay Cannons' and Mascaros' attorney's fees.

940907000

DATED this 21st April day of ~~March~~, 1999.

By the Court:



Judge Leslie Lewis

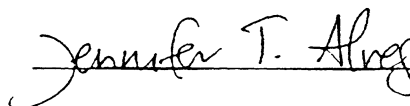
CERTIFICATE OF MAILING

I hereby certify that on the 18th day of March, 1999, a true and correct copy of Wardley's Order Denying Attorney's Fees was deposited in the U.S. Mail, postage prepaid, addressed to the following:

James C. Haskins, Esq.
HASKINS & ASSOCIATES
357 South 200 East, #300
Salt Lake City, Utah 84111

Mark O. Morris, Esq.
SNELL & WILMER, L.L.P.
111 East Broadway, Suite 900
Salt Lake City, UT 84111

John Bucher, Esq.
1343 South 1100 East
Salt Lake City, Utah 84105



Tab 5

Mark O. Morris (4636)
David N. Wolf (6688)
SNELL & WILMER L.L.P.
111 E. Broadway, Suite 900
Salt Lake City, UT 84111-1004
Telephone: (801) 237-1900
Facsimile: (801) 237-1950

Attorneys for Defendants Tracy Cannon and
Cannon Associates, Inc.

FILED DISTRICT COURT
Third Judicial District

JAN 11 2000

By SALT LAKE COUNTY
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

WARDLEY BETTER HOMES and
GARDEN,

Plaintiff,

vs.

LELAND J. MASCARO, SHERI
MASCARO, TRACY CANNON and
CANNON ASSOCIATES, INC., a Utah
Corporation,

Defendants,

FINAL ORDER OF JUDGMENT

Case No. 940907000CN

Honorable Leslie A. Lewis

LELAND J. MASCARO and SHERI
MASCARO,

Counter Claimants,

vs.

WARDLEY BETTER HOMES AND
GARDENS,

Counter Defendants,

LELAND J. MASCARO, and SHERI
MASCARO,

Third-Party Plaintiffs,

vs.

RUTH MARY HANSEN and ARLES
HANSEN,

Third-Party Defendants,

On January 29, 1999, the Court entered its Partial Findings of Facts and Conclusions of Law and Judgment dismissing Plaintiff's First, Sixth and Seventh Claims for Relief against the Mascaros and Plaintiff's Second and Fourth Claims for Relief against Ms. Cannon. In addition, the Court entered a judgment of no cause as to the Mascaros' First, Third and Fourth Counterclaims against Wardley and the Hansens, and denied any claims for relief under the Mascaros' Second Cause of Action against the Hansens.

During the trial of this matter which came before the Honorable Leslie A. Lewis on June 8, 1998 through June 11, 1998, the Court ruled from the bench, finding no cause for Plaintiff's Third and Fifth Claims for Relief.

After trial, the Mascaros and Cannon filed motions for attorney's fees and costs. Wardley opposed the motions for attorney's fees and filed objections to the defendants' claimed costs. On April 21, 1999, this Court entered its order denying the Cannons' motion for attorneys fees. On October 19, 1999, this Court also denied the Mascaros' motion for attorney's fees.

JUDGMENT


NOW THEREFORE, in accordance with the Court's ruling from the bench during the trial on this matter, and further in accordance with the Court's Partial Findings of Fact and Conclusions of Law, and Judgment dated January 29, 1999, a copy of which is attached hereto and incorporated herein, the Court hereby enters its Final Order of Judgment:

1. Dismissing Plaintiff's First, Sixth and Seventh Claims for Relief against the Mascaros;
2. Dismissing Plaintiff's Second and Fourth Claims for Relief against Mrs. Cannon;
3. Dismissing Mascaros' First, Third and Fourth Counterclaims against Wardley and the Hansens;
4. Denying any claims for relief under the Mascaros' Second Cause of Action against the Hansens;
5. Dismissing Plaintiff's Third and Fifth Claims for Relief; and
6. Denying Defendants' motions for attorney's fees.

IT IS SO ORDERED.

DATED this 11 day of Jan, 2000.

BY THE COURT:



Honorable Leslie A. Lewis
Third District Court Judge

James C Haskins (USB #1406)
HASKINS & ASSOCIATES, P. C.
357 South 200 East, Suite 300
Salt Lake City, Utah 84111
Telephone: (801) 539-0234
Facsimile: (801) 539-5210

Attorneys for Leland J Mascaro and
Sheri Mascaro

Third Judicial District

JAN 3 1999

SALT LAKE COUNTY
By *M. Snapp*

IN THE THIRD DISTRICT COURT, STATE OF UTAH
SALT LAKE DEPARTMENT, DIVISION I

WARDLEY BETTER HOMES & GARDENS, :
Plaintiff, :

v. :

LELAND J MASCARO, SHERI MASCARO, :
TRACEY CANNON and CANNON :
ASSOCIATES, INC., a Utah Corporation, :
Defendants. :

**PARTIAL FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
JUDGMENT**

LELAND J. MASCARO and SHERI MASCARO, :
Counter Claimants, :

v. :

WARDLEY BETTER HOMES & GARDENS :
Counter Defendant. :

Civil No. 940907000CN

Judge Leslie A. Lewis

LELAND J. MASCARO and SHERI MASCARO, :

Third Party Plaintiffs, :

v.

RUTH MARY HANSEN and ARLES HANSEN,

Third Party Defendants.

This matter came on for trial before the Honorable Leslie A. Lewis on June 8, 1998 through June 11, 1998. Plaintiff and Counter Defendant Wardley Better Homes and Gardens (“Wardley”) and Third Party Defendants Ruth Mary Hansen (“Mrs. Hansen”) and Arles Hansen (“Mr. Hansen”) were represented by attorneys Neil R. Sabin, J. Craig Smith, and Annette Sorensen. Defendants, Counter Claimants, and Third Party Plaintiffs Leland J. Mascaro (“Mr. Mascaro” or collectively the “Mascaros”) and Sheri Mascaro (“Mrs. Mascaro” or collectively the “Mascaros”) were represented by James C. Haskins and William D. Darden. Defendants Tracy Cannon and Cannon Associates, Inc. (“Mrs. Cannon”) were represented by Mark O. Morris and David N. Wolf. After considering the testimony of witnesses and the documentary evidence presented at the trial and legal authorities cited by the parties, the Court, ruling from the bench, found no cause for Wardley’s Third and Fifth Claims of Relief. The Partial Findings of Fact, Conclusions or Law, and Order for those claims have been previously submitted to the Court. With regard to all other Wardley claims, the Mascaro counterclaims, and Third Party claims, the Court hereby makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Mr. Hansen approached Mrs. Mascaro and asked if she would be interested in selling 128 acres of real property to Michael L. Ahlin ("Mr. Ahlin") d/b/a Wetcor. At that meeting, Mrs. Mascaro stated that if Mr. Hansen had a specific buyer for the property, she would be interested in selling it to that individual or entity.
2. Until the deal with Wetcor failed, all subsequent discussions between the Mascaros and Mr. Hansen involved the purchase of the property by Wetcor.
3. At the initial meeting, Mrs. Mascaro signed an option agreement which gave Mr. and Mrs. Hansen a twenty day option to purchase the property.
4. After he discovered that Mr. Mascaro was the actual owner of the property, Mr. Hansen asked the Mascaros to sign a second option agreement, which was dated September 14, 1998. This second option agreement was good for two months but the remainder of its terms were similar to the first option agreement.
5. Sometime prior to the execution of the second option agreement, Mrs. Mascaro informed Mr. Hansen that Century 21 All West, Inc. ("Century 21") had a six month exclusive listing agreement on the property which would expire on November 28, 1998.
6. Mr. Hansen told Wardley about the Century 21 listing agreement, and Wardley asked Mr. Hansen to get a written exemption.
7. Mr. Hansen then asked Mrs. Mascaro to get a one-party exemption from Century

21 That written exemption was acquired before the Mascaros signed the second option agreement.

8. During this time period, the Mascaros informed Mr. Hansen the terms of the deal for the property must include a Section 1031, Internal Revenue Service Code, tax free exchange.

9. Mr. Ahlen did not make an immediate offer on the property following the execution of the second option agreement, so Mr. Hansen asked Mrs. Mascaro to write a letter to him stating that another developer was interested in the property. The purpose of this letter was to put pressure on Mr. Ahlin to make a deal.

10. Mr. Ahlin finally made an offer on the property through a Real Estate Purchase Contract which Mr. Hansen had prepared and which was dated October 12, 1993. Also included in the packet of documents presented to the Mascaros and their attorney by Mr. Hansen was a Sales Agency Contract which had written across the top in Mrs. Hansen's handwriting: "This is a single party listing and that single party is Wetcor."

11. Besides the Real Estate Purchase Contract and the Sales Agency Contract, Mr. Hansen provided to the Mascaros a Dual Agency Agreement which he had also prepared and which had been executed by Mrs. Hansen and Mr. Ahlen. Prior to this time, Mr. Hansen had continuously represented to the Mascaros that he was their agent exclusively. At this time, another Wardley representative was Mr. Ahlen's agent; therefore, it was improper for Mr. Hansen to present and have Mr. Ahlen sign the Dual Agency Agreement.

12. The Mascaros' attorney advised them not to sign these documents, and offered to draft an original real estate purchase contract which included a provision which would pay Mr. Hansen a commission should Mr. Ahlen purchase the property.

13. The Mascaros based upon their attorney's advice did not accept this offer but continued to negotiate with Mr. Ahlin.

14. Because the second option agreement was set to expire, Mr. Hansen requested a meeting with the Mascaros and came to their home on a Sunday, November 14, 1993, with several documents: An Option Agreement, a Limited Agency Disclosure Agreement, a blank Real Estate Purchase Contract, and four Listing Agreements with a Salt Lake Board of Realtors Land Data Input Forms. Mr. Hansen prepared these documents the night before this meeting and had predated many of them.

15. Mr. Hansen told the Mascaros that they were making the deal in reverse and after the Mascaros' signed the documents, Mr. Hansen would present them to Mr. Ahlen with the following proposal: Mr. Ahlen would be given the opportunity to immediately purchase a small portion of the 128 acres and then have an option to purchase the remaining land. Because Mr. Hansen and the Mascaros did not know how many acres Mr. Ahlin would purchase outright, the principle terms of the Real Estate Purchase Contract were left blank.

16. All the documents presented to the Mascaros at this meeting were unsolicited, and Mr. Hansen purposely met with the Mascaros, who lacked any expertise in the field of real estate,

on a Sunday without the presence of their legal counsel.

17. At no time prior to this meeting had the Mascaros contemplated or asked Mr. Hansen to prepare a general listing agreement for the property.

18. The Mascaros were only willing to sign the Listing Agreements at the meeting because Mr. Hansen's represented that he would only received a commission from Wetcor's purchase of the property if those documents were executed.

19. At this meeting, Mr. Hansen and the Mascaros agreed that the Listing Agreements would apply to the Wetcor deal and be valid for one day only.

20. The Mascaros were also willing to sign blank documents because they believed that Mr. Hansen was looking out for their best interests.

21. Based upon Mr. Hansen's representations of the limited applicability of the documents and their trust in Mr. Hansen, the Mascaros executed the Real Estate Purchase Contract, the Option Agreement, and four of the Listing Agreements although at the meeting only one of the Listing Agreements had a written expiration date. That date was November 15, 1993, the day after the Sunday meeting.

22. The expiration date of that Listing Agreement was subsequently changed to November 15, 1994, and unlike changes to other documents executed by the Mascaros—including the signature date of the Real Estate Purchase Contract and the expiration date of the Option Agreement presented to the Mascaros at the November 14, 1993

meeting—that altered date was not initialed by the Mascaros.

23. After the Sunday meeting, Mr. Hansen altered the expiration of the dated Listing Agreement to November 15, 1994 without the Mascaros' knowledge or permission.

24. Mr. Hansen also wrote an expiration date of November 15, 1994 on the other three Listing Agreements after they were signed by the Mascaros and without their knowledge or permission.

25. Mr. Ahlin signed both the Option Agreement and the Real Estate Purchase Contract and tendered an earnest money check to Mrs. Hansen for \$4,000.00.

26. The deal between the Mascaros and Mr. Ahlin failed because the terms and the conditions of the Real Estate Purchase Contract and the Option Agreement could not be met. For instance, Mr. Ahlin failed to have the property annexed by an incorporated municipality as required by one of the addenda to the Real Estate Purchase Contract, nor did he effectuate a Section 1031 of the Internal Revenue Service Code tax free exchange as required by the addendum to the Option Agreement.

27. After a vague and vain attempt to arbitrate the issue of the earnest money, the title company eventually released the \$4,000.00 to Mr. Ahlin's assignees.

28. After the deal with Mr. Ahlin failed, the Mascaros and Michael Brodsky ("Mr. Brodsky") began discussions for the sale of the property, but no written agreement was entered into by the parties.

29. In September 1994 and while they were in negotiations with Mr. Brodsky, the Mascaros signed a one year listing agreement with Cannon Associates, Inc., and agreed to sell the property to Tracey Cannon in October of that same year.

30. The Mascaros and Tracy Cannon closed on the property on May 11, 1995, and Tracy Cannon received a sales commission from the Mascaros of \$115,338.15.

31. The Mascaros sold the property to Tracy Cannon under terms better than those proposed under the Wetcor deal.

32. Although emotionally traumatic, Mr. Hansen's conduct did not cause the Mascaros any compensatory damages or pecuniary loss.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Court hereby enters the following Conclusions of Law:

1. There is clear and convincing evidence that the Mascaros agreed to and executed the Listing Agreements under Mr. Hansen's fraudulent inducement.

2. Because the Mascaros were fraudulently induced to enter into the Listing Agreements, the terms of the Listing Agreements are neither binding nor enforceable upon any party.

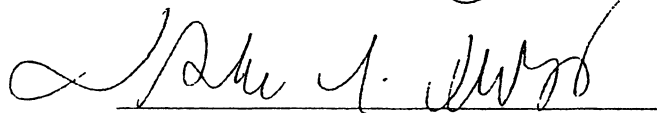
3. The Mascaros are not entitled to any damages resulting from Mr. Hansen's fraudulent representations or behavior.

JUDGMENT

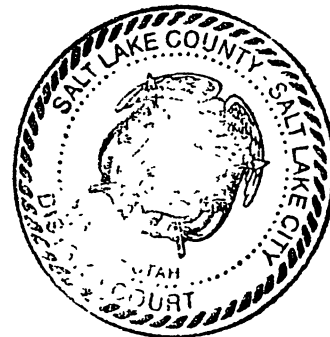
In accordance with the foregoing partial Findings of Fact and Conclusions of Law, this Court hereby enters a judgment of no cause as to Plaintiff's First, Sixth, and Seventh Claims for Relief against the Mascaros and Plaintiff's Second and Fourth Claims for Relief against Mrs. Cannon. Furthermore, the Court hereby enters a judgment of no cause as to the Mascaros' First, Third, and Fourth Counterclaims against Wardley and the Hansens, and denies any claims for relief under the Mascaros' Second Cause of Action against the Hansens.

Dated this 29th day of January 1999.

BY THE COURT:



Leslie A. Lewis
Third District Court Judge



CERTIFICATE OF SERVICE

I certify that I mailed a true and correct copy of the foregoing PARTIAL FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT, by causing the same to be mailed, via first-class United States mail, postage prepaid, to the following, this 28th day of December 1998:

Neil R. Sabin
Attorney for Plaintiff
NIELSON & SENIOR, P.C.
60 East South Temple
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Salt Lake City, UT 84111

Mark O. Morris
Attorney for Defendant Cannon.
SNELL & WILMER
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Suite 900
Salt Lake City, UT 84111

Steven B. Smith
Attorney for Plaintiff
SCALLEY & READING
261 East 300 South
Suite 200
Salt Lake City, UT 84111

John R. Bucher
Attorney for Third Party Defendant
1343 South 1100 East
Salt Lake City, UT 84105

A handwritten signature in black ink, appearing to read "Neil R. Sabin", is written over a horizontal line.

CLERK'S CERTIFICATE

On this ____ day of January 1999, pursuant to Rule 77(d), Utah Rules of Civil Procedure, and following entry thereof, I hereby certify that I caused to be mailed, via first class mail, postage prepaid, a true and accurate copy of the foregoing FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT to the following:

Neil R. Sabin
Attorney for Plaintiff
NIELSON & SENIOR, P.C.
60 East South Temple
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Salt Lake City, UT 84111

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Attorney for Defendant Cannon
SNELL & WILMER
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Steven B Smith
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SCALLEY & READING
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Salt Lake City, UT 84111

John R. Bucher
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1343 South 1100 East
Salt Lake City, UT 84105

James C. Haskins
Attorney for Defendant Mascaro
HASKINS & ASSOCIATES, P.C.
357 South 200 East, Suite 300
Salt Lake City, UT 84111

CLERK OF THE COURT

By: _____
Deputy Clerk

Steven B. Smith, #5797
SCALLEY & READING, P.C.
Attorneys for Plaintiff Wardley
261 East 300 South, Suite 200
Salt Lake City, Utah 84111
Telephone: (801) 531-7870

APR 21 1999

By M. Snapp

**IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH**

WARDLEY BETTER HOMES & GARDENS,)	
)	ORDER DENYING
)	ATTORNEY'S FEES
Plaintiff,)	
v.)	
)	
LELAND J. MASCARO, SHERI MASCARO,)	
TRACEY CANNON and ASSOCIATES, INC.,)	Civil No. 940907000 CN
a Utah corporation,)	
)	
Defendant.)	Judge: Leslie A. Lewis
)	

Defendants Tracey Cannon and Cannon and Associates ("Cannon") and Defendants/Counterclaimants/Third Party Plaintiffs, Leland J. Mascaro and Sheri Mascaro ("Mascaros"), after a trial in the above matter, petitioned the Court for an award of attorney's fees from Plaintiff/Third Party Defendant, Wardley Better Homes and Gardens ("Wardley"), pursuant to Utah Code Ann. Section 78-27-56. Memoranda in support and in opposition to those Motions were filed and those Motions were submitted for decision. The Court having reviewed the Motions, Memoranda, and being fully informed, now makes and enters the following Findings of Fact, Conclusions of Law and Order:

FINDINGS OF FACT

1. Both Cannons and Mascaros claimed a right to attorney's fees pursuant to Section 78-27-56 (1) contending that Wardley's claims were meritless and asserted in bad faith.

2. Wardley's claims, however, were not "without merit."

3. Even though the listing agreements entered between Wardley and the Mascaros were voidable because of the misconduct of Arlis Hansen, the legality of the listing agreements consisted of mixed factual and legal questions which were not entirely clear. There was no evidence presented that Wardley independently knew of Mr. Hansen's fraudulent conduct, and there was evidence that Wardley strongly believed that it had a valid claim for unpaid commissions. The evidence indicated: (a) Wardley had an honest belief in the propriety of the activities in question; (b) Wardley did not intend to take unconscionable advantage of others; and (c) Wardley did not intend to or act with knowledge that its activities would hinder, delay, and defraud Cannon or the Mascaros.

CONCLUSIONS OF LAW

1. Cannon and Mascaros failed to demonstrate that Wardley's claims were "frivolous," or "of little weight or importance, having no basis in law or fact" as set forth in *Cady v. Johnson*, 671 P.2d 149, 151 (Utah 1983).

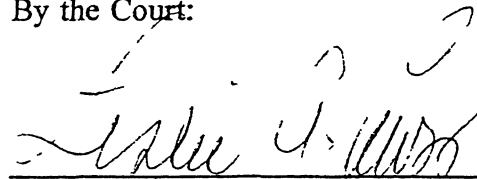
2. Wardley's Complaint was not asserted or pursued in bad faith.

3. The totality of facts and circumstances would make it inequitable to force Wardley to pay Cannons' and Mascaros' attorney's fees.

940907020

DATED this 21st ^{April} day of ~~March~~, 1999.

By the Court:



Judge Leslie Lewis

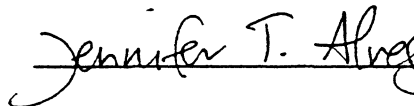
CERTIFICATE OF MAILING

I hereby certify that on the 18th day of March, 1999, a true and correct copy of Wardley's Order Denying Attorney's Fees was deposited in the U.S. Mail, postage prepaid, addressed to the following:

James C. Haskins, Esq.
HASKINS & ASSOCIATES
357 South 200 East, #300
Salt Lake City, Utah 84111

Mark O. Morris, Esq.
SNELL & WILMER, L.L.P.
111 East Broadway, Suite 900
Salt Lake City, UT 84111

John Bucher, Esq.
1343 South 1100 East
Salt Lake City, Utah 84105



for attorney's fee

12-99 Filed: Notice to submit for decision oral argument requested-mo
for atty fees chells

12-99 Filed: Mascaros' response to Wardley and Hansen's opposition to
Mascaros' motion for attorneys fees from third party defendantschells

19-99 Filed order: Signed court's ruling-Mascaros are not entitled to
attorney fees, counsel for Hansens is to prepare an order
consistent with ruling chells

Judge llewis
Signed October 19, 1999

07-00 Filed: Verified bill of costs janeilm

11-00 Filed order: Signed final order of judgment chells

Judge llewis
Signed January 11, 2000

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Tab 6

This opinion is subject to revision before
publication in the Pacific Reporter.

IN THE UTAH COURT OF APPEALS

FILED
Utah Court of Appeals

FEB 15 2001

Paulette Stagg
Clerk of the Court

-----ooOoo-----

Wardley Better Homes and
Garden,
Plaintiff and Appellee,

v.

Tracy Cannon; Cannon
Associates, Inc., a Utah
corporation; Leland J.
Mascaro; and Sheri Mascaro,
Defendants and Appellants.

Leland J. Mascaro and Sheri
Mascaro,
Counter-claimants,

v.

Wardley Better Homes and
Gardens,
Counter-defendant.

Leland J. Mascaro and Sheri
Mascaro,
Third-party Plaintiffs,

v.

Ruth Mary Hansen and Arles
Hansen,
Third-party Defendants.

OPINION
(For Official Publication)
Case No. 20000128-CA

F I L E D
(February 15, 2001)

2001 UT App 48

Third District, Salt Lake Department
The Honorable Leslie A. Lewis

Attorneys: David N. Wolf and Mark O. Morris, Salt Lake City, for
Appellants
Steven B. Smith, Darwin H. Bingham, John R. Bucher,
and James C. Haskins, Salt Lake City, for Appellee

Before Judges Jackson, Orme, and Thorne.

JACKSON, Associate Presiding Judge:

¶1 Tracy Cannon (Cannon) and Cannon & Associates, Inc., (Associates) appeal from the trial court's order denying their request for attorney fees. We affirm.

BACKGROUND

¶2 On November 14, 1993, Leland J. Mascaro and Sheri Mascaro (Mascaros) and Wardley Better Homes and Gardens signed four listing agreements (listing agreements) through Wardley's agent, Arles Hansen (Hansen). The first listing agreement, which was set to expire the next day, reflects the actual agreement between the Mascaros and Hansen. The expiration dates on the other three listing agreements were left blank. Hansen, after obtaining the Mascaros' signatures and without their knowledge or approval, altered the expiration date on the first of the four listing agreements from November 15, 1993 to November 15, 1994, and unilaterally filled in the blank expiration dates on the three other listing agreements with the same fraudulent date. In September 1994, the Mascaros signed a one-year listing agreement with Associates as broker. Later, the Mascaros signed a Real Estate Purchase Agreement agreeing to sell the property to Cannon. The Mascaros and Associates eventually closed on the sale of the property to Cannon in 1995. Cannon received a \$115,338.16 commission from the sale.

¶3 As a result, Wardley brought an action against the Mascaros to recover a real estate commission under its four listing agreements. The Mascaros answered Wardley's complaint and counterclaimed against Wardley. Further, they filed a third-party complaint against Hansen and his wife Ruth, claiming negligence, fraud, breach of contract, and seeking a declaratory judgment. Wardley filed an amended complaint against Cannon asserting unlawful interference with contract, conspiracy, and seeking a declaratory judgement. Cannon filed a motion for summary judgment, but the trial court denied the motion because there were "material facts at issue." Wardley then filed, with the permission of the trial court, a second amended complaint against Associates for violation of statutes and conversion, in addition to all of the claims filed in the first amended complaint against Cannon. After four days of "carefully evaluating the trial testimony and carefully scrutinizing the numerous documents entered into evidence," the trial court ruled against Wardley on all claims. The court concluded that, due to fraud in the inducement, the listing agreements signed by the Mascaros were voidable and unenforceable. The court also concluded that Wardley had failed to meet its burdens of proof on its claims against Associates. Further, the trial court ruled that the Mascaros were unable to recover on any of their counterclaims or third-party claims.

¶4 Associates, Cannon, and the Mascaros requested attorney fees pursuant to Utah Code Ann. § 78-27-56 (1996 and Supp. 1999). The trial court denied their requests, concluding that Wardley's claims were not shown to be "without merit" and not brought in "bad faith," as the statute requires. See Utah Code Ann. § 78-27-56 (1996 and Supp. 1999). Cannon and Associates appeal the trial court's ruling, arguing that the statutory requirements of section 78-27-56 were satisfied via principles of vicarious liability, which principles they suppose impute knowledge of Hansen's fraudulent actions to Wardley. Appellants contend that even if there was no evidence that Wardley knew of Hansen's fraud before bringing claims against the Mascaros, Cannon, and Associates, principles of vicarious liability should still impute to Wardley the knowledge that the listing agreements under which Wardley brought suit were obtained by fraud. If such knowledge is imputed to Wardley, Appellants reason, then Wardley's suit would be without merit and brought in bad faith, thus entitling Appellants to attorney fees under section 78-27-56. Appellants challenge the trial court's ruling as to attorney fees purely as a matter of law, marshaling no evidence to dispute any issue of fact.

STANDARD OF REVIEW

¶5 Section 78-27-56 authorizes the court to award attorney fees to a prevailing party "if the court determines that the action or defense to the action was [1] without merit and [2] not brought or asserted in good faith." Id. An appeal from a ruling that attorney fees are unavailable under section 78-27-56 involves two standards of review, one for each step of the analysis respectively.¹ Whether a claim is without merit is a question of

1. Citing Valcarce v. Fitzgerald, 961 P.2d 305 (Utah 1998) and Robertson v. Gem Ins. Co., 828 P.2d 496 (Utah Ct. App. 1992), Appellants assert that we should review the attorney fees issue as a legal question, reviewing only for correctness. Appellants misstate the standard of review. Where section 78-27-56 is invoked as a basis for attorney fees, our decisions specify that "the finding of bad faith is a question of fact and is reviewed by this court under the 'clearly erroneous' standard." Jeschke v. Willis, 811 P.2d 202, 204 (Utah Ct. App. 1991). "To clarify the matter: As to whether the party lacked good faith, the trial court must make a factual finding of a party's subjective intent. In addition, the trial court must conclude, as a matter of law, that the action was without merit." Pennington v. Allstate Ins. Co., 973 P.2d 932, 939 n.3 (Utah 1998).

Similarly, Appellants misstate the trial court's findings.

(continued...)

law which the appellate court reviews for correctness, while a determination of bad faith is a question of fact and is reviewed by the appellate court under a clearly erroneous standard. See Jeschke v. Willis, 811 P.2d 202, 203-04 (Utah Ct. App. 1991) (citations omitted); Pennington v. Allstate Ins. Co., 973 P.2d 932, 939 n.3 (Utah 1998).

ANALYSIS

¶6 The trial court did not commit reversible error in ruling that Appellants were not entitled to attorney fees under Utah Code Ann. § 78-27-56 (1996 and Supp. 1999). The statute permits an award of attorney fees "to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith," subject to exceptions which do not apply here. Utah Code Ann. § 78-27-56(1) (1996 and Supp. 1999). Where an action is without merit and is not asserted in good faith, the court, in its discretion, may deny fees only if it enters in the record the reasons for not awarding fees under section 78-27-56(1). See id. § (2). Here, as required by the statute, the trial court stated its reasons for denying Appellants' request for attorney fees, both in its Memorandum Decision and in its Order Denying Attorney Fees.

I. Challenge Based on Statutory Requirements

¶7 A finding of bad faith is a factual question. Jeschke v. Willis, 811 P.2d 202, 204 (Utah Ct. App. 1991). Thus, to challenge a finding of fact, Appellants must marshal the evidence, citing the appellate court to all the evidence supporting trial court's ruling. Then, Appellants must demonstrate why, even when viewed in the light most favorable to the trial court, the evidence is insufficient to support the challenged finding. See Valcarce v. Fitzgerald, 961 P.2d 305,

1. (...continued)

They state that "the court found that Wardley, through its agent Arles Hansen . . . had altered the dates of certain listing agreements." Further, they state in their brief that the "trial court found that through its agent, Wardley took full advantage of its opportunity to deceive the Mascaros" While the trial court found that Hansen acted in the manner described, nowhere in the record is there a finding by the trial court that Wardley had either altered listing agreement dates or taken full advantage of an opportunity to deceive.

Lastly, Appellants indicate that Hansen urged Wardley to initiate its suit, but provide no citations to the record to support that assertion.

312 (Utah 1998); West Valley City v. Majestic Inv. Co., 818 P.2d 1311, 1313 (Utah App. 1991). Here, Appellants failed to marshal the evidence supporting the trial court's finding that Wardley did not act in bad faith.² They explain in their reply brief that they purposely decided not to marshal the evidence because they accepted the "purely factual findings of the trial court as true." Thus, we must "assume[] that the record supports the findings of the trial court," including the finding that Wardley's suit was not pursued in bad faith. Saunders v. Sharp, 806 P.2d 198, 199 (Utah 1991). Consequently, because a finding of bad faith is required before a court can award attorney fees under section 78-27-56, our acceptance of this finding as true is fatal to this appeal.³

II. Challenge Based on Vicarious Liability

¶8 Appellants seek to overcome both of the statutory requirements by advancing novel theories of vicarious liability. They assert that Wardley can be required to pay their attorney fees by utilizing vicarious liability in two ways which are unsupported by any case law.⁴ First, they seek to apply vicarious liability,

2. "[L]ack of good faith . . . for the purposes of [Utah Code Ann. § 78-27-56], is synonymous with a finding of 'bad faith.'" Jeschke, 811 P.2d at 204 (quoting Cady v. Johnson, 617 P.2d 149, 151-52 (Utah 1983)).

3. Although the trial court mislabeled its finding as to bad faith by inserting it under the heading, "Conclusions of Law," we disregard the label and work to the substance. See Gillmor v. Write, 850 P.2d 431, 433 (Utah 1993).

4. Appellants rely solely on their theory of vicarious liability for reversal. Because this theory ultimately fails, we need not address whether the trial court properly determined if Wardley's suit was without merit or was pursued in bad faith pursuant to section 78-27-56. However, assuming arguendo that we were to reach this issue, Appellants' argument still fails. Whether the listing agreements were legal was unclear. On their face, the listing agreements seemed legitimate. The trial court was required to hear a four-day trial and to weigh a significant amount of evidence to determine otherwise. The record does not support a finding that Wardley "(i) lacked an honest belief in the propriety of the activities in question; (ii) . . . intended to take unconscionable advantage of others; or (iii) . . . intended to act with the knowledge that [its] activities would hinder, delay, or defraud others", as is required for a finding of bad faith. (Childs v. Calahan, 1999 UT App 359, ¶16, 993 P.2d (continued...))

a theory ordinarily applied only in tort and in limited circumstances to punitive damages, to attorney fees; specifically those available under section 78-27-56. Second, they seek to apply vicarious liability to make the principal liable for the principal's own actions, rather than the actions of the agent. Their argument is this: The statutory prongs of a meritless suit pursued in bad faith can both be satisfied simply by imputing Hansen's knowledge of his own fraud to Wardley. But Appellants have cited no legal authority from any jurisdiction in which attorney fees have been awarded under their novel theory. Even so, Appellants argue that the general vicarious tort liability principles set forth in Hodges v. Gibson Prod. Co., 811 P.2d 151 (Utah 1991) support their assertion.

¶9 In Hodges, the court imputed knowledge of a managerial employee, Cosgrove, to his employer and held his employer liable for Cosgrove's intentional malicious prosecution of Hodges. See id. at 163. There, Cosgrove had acted within the scope of his authority in initiating the prosecution. See id. However, he knew but did not reveal the probability that he himself committed the crime of which Hodges was accused. See id. at 155. The Hodges court invoked Restatement (Second) of Torts as the basis for imputing Cosgrove's knowledge to his employer:

In accordance with and subject to the rules stated in this Topic, the liability of a principal is affected by the knowledge of an agent concerning a matter as to which he acts within his power to bind the principal or upon which it is his duty to give the principal information.

Id. at 157 (citing Restatement (Second) of Torts § 272). However, the court clarified that Cosgrove's knowledge could be imputed to his employer only if Cosgrove acted within the scope of his authority⁵ and was motivated at least in part to carry out the employer's purposes. See id.

¶10 Similarly, the Hodges court cited Restatement (Second) of Torts § 253 to apply vicarious liability to initiation of a legal action when the agent is authorized to initiate the action. See

4. (...continued)

244 (quoting Cady v. Johnson, 671 P.2d 149, 151 (Utah 1983)).

5. Hansen may have had authority to enter into the listing agreements with the Mascaros; however, he did not, under any agency theory, have authority to fraudulently change the dates on those agreements.

id. But the court only addressed the situation where an employee, rather than his principal, initiates a tortious legal action. See id. Thus, Hodges stands for the proposition that knowledge of an employee can be imputed to his employer when an employee tortiously brings a legal action (which is at least partially motivated to carry out the employer's purposes) if it is within the scope of the employee's authority to bring the action. Accordingly, for Appellants to succeed on their claim of vicarious liability, based on Hodges, they would have to show that Wardley's suit was brought: (1) in tort, (2) by Hansen who (3) was acting within the scope of his employment in bringing the suit. Appellants have not alleged, nor shown, any of these factors.


¶11 Nevertheless, Appellants urge us to stretch the vicarious liability principles set forth in Hodges as follows: "[W]here the principal filed legal proceedings at the agent's behest, the principal has no less liability as the main actor than it would have if the agent had instituted such proceedings on behalf of the principal." Appellants cite no authority for this proposition.⁶ Instead, they take language from Hodges and remold it to fit their theory. That is, they recast the passage, "the liability of a principal is affected by the knowledge of an agent concerning a matter as to which he acts," id. at 157 (emphasis added), to mean Wardley's liability is effected by Hansen's knowledge that Hansen acted fraudulently toward the Mascaros. What Hodges stands for, however, is that the agent's knowledge of an opposing party's innocence, at the time the agent tortiously initiates legal proceedings on behalf of his principal, is imputed to the principal. In Hodges, Cosgrove, the agent, initiated the legal action, whereas here, the agent Hansen did not initiate the action. Hansen Appellants rewrite Hodges, without citing any authority from any jurisdiction to do so. There is no legal support for Appellants' claim that vicarious liability should be applied in a manner that imputes the agent's

6. Appellants, also propose an "unfairness" public policy argument to support their position. They argue that unfairness arises because their vicarious liability theory runs into a legislative roadblock, which limits the ability to file suits for real estate commissions to brokers; agents cannot sue. Thus, unless vicarious liability is invoked, brokers can escape liability for filing a bad faith claim for commissions even though encouraged to do so by an agent. This argument does not persuade us to apply their novel theory of vicarious liability.

knowledge to the principal to answer for the principal's own actions.⁷

CONCLUSION

¶12 Appellants' statutory challenge fails because they did not marshal the evidence regarding bad faith. Appellants' vicarious liability argument is without legal justification. Accordingly, we affirm.


Norman H. Jackson,
Associate Presiding Judge

¶13 I CONCUR:


William A. Thorne, Jr., Judge

¶14 I CONCUR IN THE RESULT:


Gregory K. Orme, Judge

7. Use of vicarious liability as a means of awarding attorney fees under section 78-27-56 is a task better suited to the legislature than to this Court. On a purely theoretical spectrum, it is possible there is a point at which knowledge may be imputed to a principal in a case where the principal initiates a suit based upon fraudulent actions of its agent, but we see no need to draw that line today.

CERTIFICATE OF MAILING

I hereby certify that on the 15th day of February, 2001, a true and correct copy of the attached OPINION was deposited in the United States mail to:

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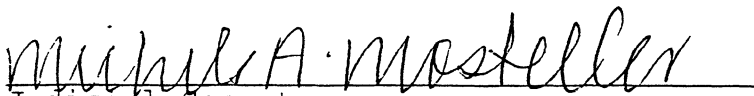
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and a true and correct copy of the attached OPINION was placed in Interdepartmental Mailing to be delivered to the judge listed below:

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APPEALS CASE NO.: 20000128-CA