

1980

Bruce E. Holmes dba Holmes Realty v. DeGraff Associates, Inc. : Petition for Rehearing

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

BRUCE E. HOLMES, dba)
HOLMES REALTY,)
)
Plaintiff-Appellant,)
)
vs.) Case No. 16549
)
DeGRAFF ASSOCIATES, INC.,)
)
Defendant-Respondent.)
)

PETITION FOR REHEARING
AND BRIEF IN SUPPORT THEREOF

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PRELIMINARY STATEMENT

Bruce Holmes, plaintiff-appellant, respectively petitions this Court for a rehearing and a decision in the above-referenced matter filed May 22, 1980. The issue before this Court on appeal was plaintiffs' entitlement to a real estate commission for the sale of certain property owned by defendant-respondent, DeGraff Associates. This Court affirmed the district court's finding that plaintiff waived any right to a commission.

POINT I. THE COURT ERRED IN ITS "FINDINGS OF FACT".

A. The Court's opinion states that the contract with the third-party buyer provided for the same purchase price as stated in the option with the same annual payments, but with a balloon payment on September 30, 1985. This is not accurate. The annual payments in the option were \$100,000 whereas in the subsequent agreement with American Development Company the

annual payments were \$50,000 each on July 31 and September 30 of each year, plus the payments due Farnsworth and Associates, in the amount of \$72,164, or an annual total of approximately \$172,000. The Court's opinion further suggests that the balloon payment was the only change from the previous contract, whereas the agreement between American Development Company and DeGraff Associates involves several new documents and numerous different terms.

B. This Court stated there is no evidence to support plaintiffs' claim that defendant repudiated the option. A reading of the record clearly shows that DeGraff Associates repudiated the option and clearly expressed to plaintiff that it would not close on the option as written. See transcript pages 93-94, 120-122, 131-132, 138-139, and 147-148.

C. The Court's opinion states that there is no agreement of defendant under which plaintiff can claim a commission. Plaintiff's claim is based upon the agreements of plaintiff and defendant with the Salt Lake Board of Realtors and the Board's Multiple Listing Service. In connection with DeGraff Associates' listing of the property, DeGraff Associates removed the property from the Multiple Listing Service by signing a Non-Sale Agreement which provided for payment of a commission upon sale of the property. Plaintiff's claim, and defendant's obligation for a commission, is based upon the listing with the Salt Lake Board of Realtors' Multiple Listing Service and the Non-Sale Agreement signed by DeGraff Associates.

in connection therewith.

D. The Court's opinion states "the option . . . culminated in a contract for the sale of the property to plaintiff's assignee." The trial court made no such finding. The trial court found: "At all times the plaintiff's agreement was in effect whereby no commission would be payable from the defendant to the plaintiff in connection with the sale of the subject property". This finding must fail because of:

(a) defendant's repudiation,

(b) the rescission of the option and discharge by a new agreement,

(c) defendant's withdrawal of its promise, the bargain sought by plaintiff, and

(d) the rule against perpetuities.

POINT II. THE BARGAIN FOR WHICH PLAINTIFF AGREED WAS WITHDRAWN, RESCINDED OR REPUDIATED BY DEFENDANT.

The Court's opinion states: "Plaintiff's waiver of a commission was the basis on which defendant accepted the offer and granted the option . . ." Plaintiff has no argument with this statement, so far as it goes. Similarly, plaintiff's waiver of a commission was based on defendants' granting of an option on the terms contained in the option. When defendant refused to abide by the terms of the option and proceed in accordance with those terms, the basis on which plaintiff gave the offer and received the option was also terminated.

POINT III. THE COURT DID NOT ADDRESS OR DID NOT RESOLVE ISSUES PRESENTED BY PLAINTIFF, WHICH ENTITLE PLAINTIFF TO RECOVER ON HIS CLAIM.

A. The Court referred to but did not resolve the question of whether the option is void as being violative of the rule against perpetuities.

B. The Court does not address appellant's point that the option was rescinded and discharged by a new agreement.

CONCLUSION

Plaintiff-Appellant respectively requests a rehearing of this case, for the reasons stated above. This petition is supported by a Brief.

Respectfully submitted this ____ day of June, 1980.

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