

1980

# Bruce E. Holmes dba Holmes Realty v. DeGraff Associates, Inc. : Brief in Support of Petition for Rehearing

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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BRUCE E. HOLMES, dba	)	
HOLMES REALTY,	)	
	)	BRIEF IN SUPPORT OF
Plaintiff-Appellant,	)	PETITION FOR REHEARING
	)	
vs.	)	Case No. 16549
	)	
DeGRAFF ASSOCIATES, INC.,	)	
	)	
Defendant-Respondent.	)	
	)	

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This Brief is submitted in support of the Petition of Bruce E. Holmes, plaintiff-appellant, for rehearing. The Petition for Rehearing is filed with this Brief.

STATEMENT OF FACTS

The facts are stated in the Brief of Appellant, pages 2 through 13.

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 in that the annual payments provided in the agreement between DeGraff Associates and American Development Company were substantially different from the annual payments provided for in

the option. The Court's opinion further suggests that the balloon payment was the only change from the previous contract, whereas the agreement ("Agreement") between American Development Company and DeGraff Associates involves several new documents and numerous different terms.

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 \$72,164.00, or an annual total of approximately \$172,000. Executed concurrently with the agreement (Exhibit 17-P) between DeGraff Associates and American Development Company were the following documents: Assignment of Contract (Exhibit 19-P), Supplemental Agreement (Exhibit 21-P), Escrow Instructions (Exhibit 20-P), Warranty Deed (Exhibit 18-P) and a Sellers and Buyers Escrow Statement (Exhibit 22-P).

The Agreement, and documents executed concurrently therewith, provided the following terms or provisions, not mentioned in the option: (1) establishment of escrow; (2) payment into escrow; (3) delivery of deed to escrow; (4) partial conveyances; (5) payment to Farnsworth Associates, DeGraff Associates Contract seller, by American Development Company; (6) final payment on or before September 30, 1985; (7) DeGraff's obligation to pay off the Lockhart Company, to which DeGraff Associates had assigned its contract with

Farnsworth Associates; (8) authority to subdivide, install roads, curbs, gutters, sidewalks, sewers and other improvements; and (9) default provision.

In addition to the foregoing new terms not mentioned in the option, several terms were changed. The option provided for interest at eight per cent per annum on the unpaid principal; the Agreement, five and three-fourths per cent. The option provided for a down payment of \$100,000; the Agreement \$75,000, plus the payment due Farnsworth and Associates, \$72,163, on or before September 1. The option provided for annual payments of \$100,000; the Agreement provided for payment of \$50,000 on or before each July 31 and September 30 of each year, plus \$72,154 to Farnsworth and Associates annually on or before September 1 on the contract between Farnsworth and Associates and DeGraff Associates (Exhibit 36-P).

There can be no question from the foregoing that the terms of the Agreement are inconsistent with the option. As stated in 17 Am. Jur. 2d, Contracts §493:

If the parties to a contract make a new and independent agreement concerning the same matter in the terms of the latter are so inconsistent with those of the former that they cannot stand together, the latter may be construed to discharge the former.

Further, a contract may be rescinded by acts or conduct of the parties. See 17 Am. Jur. 2d, Contracts §494.

The terms of the agreement when compared to the option, compel the conclusion that DeGraff Associates abandoned

its rights, and liabilities, under the option in favor of the Agreement and related documents. The discharge of the option discharges any waiver of Holmes' right or claim to a commission contained in the option.

B. The Court stated there is no evidence to support plaintiff's claim that defendant repudiated the option. The evidence of repudiation is clear, convincing and uncontradicted. The rules of appellate review require this Court to review the evidence in the light most favorable to the successful party at the trial court. Carnesecca v. Carnesecca, 572 P. 2d, 708 (Utah 1977). However, this rule of appellate review requires the Court to review the evidence. The record clearly shows that DeGraff Associates repudiated the option and expressed to plaintiff it would not close on the option as written. A review of the evidence will lead to this conclusion. See transcript pages 93-94, 120-122, 131-132, 138-139, and 147-148.

If DeGraff Associates had honored the option and performed in accordance with its terms, Holmes would have no claim for a commission. However, the facts are clear that DeGraff Associates did not honor the option but rather repudiated or rescinded the promise made to Holmes. DeGraff Associates agreed, upon Holmes agreement to accept no commission, to give an option on the terms contained in the option, which included an annual payment of \$100,000 per year. On the basis of those terms, Holmes accepted the offer and paid the consideration for

the option. DeGraff Associates had promised that upon exercise of the option it would be bound by a contract which had the purchase price and the annual payments as provided in the option. The record is clear that this was not satisfactory to DeGraff Associates, that the perpetual contract was not acceptable. When DeGraff Associates, clearly and repeatedly, told Holmes that the option was invalid because of the perpetual nature of the contract terms and that they would not perform in accordance with those terms, it effectively repudiated the promise which Holmes had bargained for, namely that the property could be purchased on the terms contained in the option.

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 in pertinent part as follows:

I agree to pay you the commission as per listing contract in the event that said property is sold by myself or any other person, firm or corporation.

The property was sold through the efforts of plaintiff to American Development Company within the term of the Sales Agency Contract. Based upon the parties' agreements with the Salt Lake Board of Realtors Multiple Listing Service, and the

Non-Sale Agreement signed by DeGraff Associates, defendant entered into agreements, on which plaintiff can rely, to claim a commission.

D. The Court's opinion states "The option . . . cumulated in a contract for the sale of the property to plaintiff's assignee." The trial court made no finding to that effect. The trial court's finding was that plaintiff's agreement waiving a commission was in affect at all times. This finding must fail because of (a) defendants' repudiation, see Point I.B. above, (b) the rescission of the option and discharge by a new agreement, see Point I.A. above, (c) defendants withdrawal of its promise, the bargain sought by plaintiff, see Point II, below, and (d) the rule against perpetuities, see Point III, below.

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 statment, so far as it goes. Similarly, plaintiff's waiver of a commission was based on defendant's granting of an option on the terms contained in the option. In effect Holmes said: "In exchange for your promise to sell your property on the terms contained in this option, if exercised, I agree to waive my commission." As stated before, if DeGraff Associates

had honored the option and performed in accordance with its terms, Holmes would have no claim for a commission. However, since DeGraff Associates demanded that the terms of the option be changed and that it would perform only new and substantially different terms, it breached the promise it had made. The discharge of the option, by repudiation or rescission, terminated all of the terms of the option, including paragraph 8. Thereafter, the parties' agreements with the Multiple Listing Service of the Board of Realtors were reinstated, effective as they had been prior to the option.

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 not resolve the question of whether the option is void as being violative of the rule against perpetuities.

The Court should find that the option was void as a matter of law. DeGraff Associates treated the option as invalid and asserted it as a defense to the option to require plaintiff and his assignee to enter into a new agreement.

DeGraff Associates clearly and unequivocally refused to sell according to the terms of the option, and relied upon the rule against perpetuities as the basis for doing so. Having taken that position, DeGraff Associates should be held to that position. Just as American Development Company is not entitled to rely on the payment provisions of the option, or

any other provision thereof, DeGraff Associates is not entitled to rely on paragraph 8 of the option to deny Holmes a real estate commission.

Holmes is entitled to have this Court consider, and rule upon his claim that the rule against perpetuities renders the option void, including paragraph 8 of the option. See also Point V of Brief of Appellant and Point II of Reply Brief of Appellant.

B. The Court does not address appellant's point that the option was rescinded and discharged by a new agreement. See Point I.B., above and II of Brief of Appellant.

#### CONCLUSION

Based upon the foregoing, plaintiff-appellant prays for this Court to rehear this case and that this Court reverse the judgment of the Trial Court and order that judgment be entered in his favor.

Dated this \_\_\_\_\_ day of June, 1980.

Respectfully submitted,

MOYLE & DRAPER

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CERTIFICATE OF SERVICE

This is to certify that I mailed a true and correct copy of the foregoing Petition for Rehearing and Brief in Support Thereof to the following this \_\_\_ day of June, 1980, postage prepaid:

Neil R. Sabin, Esq.  
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