

1979

# Knight Realty Inv. Co. v. Charles C. Moore et al : Brief of Appellant

Utah Supreme Court

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SOUTHERN  
Corporation

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FILE

DEC 3 1971

IN THE SUPREME COURT  
OF THE STATE OF UTAH

KNIGHT REALTY INV. CO., A )  
Utah Corporation, )

Plaintiff and )  
Respondent, )

VS )

CHARLES C. MOORE & CHARLES )  
C. MOORE dba SOUTH VILLAGE )  
SHOPPING CENTER & SOUTH )  
VILLAGE SHOPPING CENTER & )  
SOUTH VILLAGE INC., A Utah )  
Corporation, )

Defendant and )  
Appellant )

Case No. 16550

APPELLANT'S BRIEF

\*\*\*\*\*

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SOUTH VILLAGE INC., A Utah )  
Corporation, )  
 )  
Defendant and )  
Appellant )

Case No. 16550

APPELLANT'S BRIEF

\*\*\*\*\*

APPEAL FROM A JUDGMENT OF THE  
THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY  
THE HONORABLE ERNST BALDWIN, DISTRICT JUDGE

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

KNIGHT REALTY INV. CO., A )  
Utah Corporation, )

Plaintiff and )  
Respondent )

VS )

CHARLES C. MOORE & CHARLES )  
C. MOORE dba SOUTH VILLAGE )  
SHOPPING CENTER & SOUTH )  
VILLAGE SHOPPING CENTER & )  
SOUTH VILLAGE INC., A Utah )  
Corporation, )

Case No. 16550

Defendant and )  
Appellant )

APPELLANT'S BRIEF

STATEMENT OF NATURE OF CASE

Respondent filed a law suit against the Appellant to enforce payment of a real estate commission on an alleged proposed lease of property owned by Appellant, South Village Inc., which lease was never fully completed.

DISPOSITION IN THE LOWER COURT

The case was heard by the Honorable Ernst Baldwin, Third Judicial District Court in and for Salt Lake County. The Honorable Judge Baldwin, after hearing the evidence, ruled that a real estate commission had been earned even though a building was not built. Said building was not

completed nor the contract fully consummated due to the failure to obtain approval from other tenants. The Appellant filed the appeal to reverse the judgment of the court.

#### RELIEF SOUGHT BY APPELLANT ON APPEAL

Appellant, South Village Inc., seeks an Order reversing the Order of the trial court in this matter, payment of Appellant's costs incurred herein.

#### STATEMENT OF FACTS

On or about April 23, 1976 the Plaintiff and the Defendant entered into a Real Estate Listing Agreement (Exhibit 1). Later a second agreement was entered into by the parties.

The Plaintiff in this matter presented a proposal to obtain Prudential Federal Savings and Loan Association as a lessee and an option agreement was prepared offering to build a building on the property of the Defendant with an agreement lease the same to Prudential Savings and Loan. (Exhibit 2-P)

It was later necessary to execute an extension agreement extending the above option. This was prepared and signed by the parties and Prudential Federal Savings. (Exhibit 3-P)

On or about the 15th day of August, 1977, a lease agreement was prepared to be executed between Prudential Federal Savings and South Village Inc. This was for the construction of a building on the property and an

agreement to lease the property to Prudential Federal Savings and Loan. At the time of the execution of this agreement, the Defendant, through its president, Charles Moore, placed a condition upon the lease indicating that it was necessary to receive the approval of the other tenants in the South Village Shopping Center to construct a new building. There was after this date, certain letters which were exchanged between South Village and Prudential. A meeting took place on or about the 18th day of October, 1977 wherein there was a discussion with respect to the above mentioned project. At this meeting, Mr. Moore indicated that he felt that he could obtain the agreement of the tenants although such agreement had not as yet been received and Mr. Moore was apprehensive about going forward. However, after some discussion, the limiting endorsement was lined out. The Defendant was unable to, at any time, obtain the final approval from one of the tenants, Rexall Drug Company. Said approval was never received and the Defendant maintained that it was impossible to consummate the lease agreement.

The Defendant through its president, Mr. Charles Moore, attempted to obtain the approval from Rexall but was unable to do so although he felt that he could provide some additional parking to them which would cure the objection. This was never consummated and Defendant was prevented from completing the lease agreement by Rexall.

The Listing agreement stated that payments of the commission should come out of the construction funds but the



lease was never completed, consummated or financed. A question was raised as to an alternate site to be provided by Prudential Federal Savings & Loan at the same Shopping Center but there was never a submission of the site or lease as to this fact. The Court found a buyer had been provided and awarded judgment of \$18,000.00 to the Plaintiff. If is from this judgment that Appellant has filed this appeal.

### ARGUMENT

#### Point 1

THE TRIAL COURT ERRORED IN DETERMINING THAT  
A LEASE WAS FULLY CONSUMMATED AND APPROVED AND  
A REAL ESTATE COMMISSION EARNED WHEN INFACIT A THIRD  
PARTY HAD PREVENTED THE CONSUMMATION OF THE LEASE

As had been stated, the lease which was entered into by the Defendant and Prudential Federal Savings and Loan provided for the construction of a building and a lease back to Prudential Federal Savings and Loan. Said lease although appearing on its face to have been consummated was never fully consummated because of the fact that the approval of Rexall Drug was never received. This had been made known to the Plaintiff in this matter.

It is a well settled point of law and the general rule that "when a broker provides a buyer ready, willing and able to buy the list of property or enter into the lease that it is entitled to a commission." Curtis vs Mortensen 267 P.2d 237 (Utah, 1954) and reiterated in many other cases.

In Davis vs Heath Development Company 558 P. 2d 594 (Utah 1976) the Supreme Court of the State of Utah stated that "If an agent so performed and the sale is not completed because

the lack of cooperation or abstruction by the Seller..., the agent is nevertheless entitled to his commission." However, in the instant matter, it is clear that the failure on the part of the Defendant was not his refusal to proceed nor his denial to enter into the agreement but because of its contract with Rexall Drug Company, which he had interpreted to mean that Rexall had an approval right as to obtaining of a new lessee in the area. The question remains one of whether infact the Defendant, through its officers, obstructed or denied the right to proceed arbitrarily or whether infact they had good legal cause. It has been stated that if the Defendant knew of this problem that he should have made Prudential Federal Savings and the Broker aware of such situation. This he did by the endorsement which he placed on the proposed lease agreement. Plaintiff alleged that this was declared null and void at a meeting held between the parties and that Defendant desired to proceed. Although Defendant did infact sign the amendment, it is clear that he still maintained that he had to obtain the approval of Rexall. He indicated that he thought he could get this approval by giving other parking places to Rexall but Rexall did not accept this offer. This prevented the Defendant from proceeding with the lease and should not have been attributable to Defendant.

## POINT 2

THE COMMISSION AGREEMENT CONTAINED A CONDITION PRECEDENT THAT ALL FUNDS WERE TO BE PAID OUT OF A CONSTRUCTION WHICH LOAN WAS NEVER CONSUMMATED OR APPROVED.

On or about the 15th day of August, 1977, Plaintiff and Defendant entered into an agreement entitled "Agreement" which

specified that the Defendant would pay a commission to the Plaintiff for obtaining a lease with Prudential Federal Savings and Loan. (Exhibit 5-P) Said agreement specifically noted that "Therein is noted the employment of Agent; services to construct and lease a branch bank to Prudential Federal Savings and Loan on Owners land located at approximately 9471 South 700 East, Salt Lake County, State of Utah, which Owner agrees to pay a commission for such services in accordance with the terms therein." It is noted that the employment of the agent service was to result in the construction and lease of a branch bank. The agreement stated further in paragraph 2 "Owner agrees that agent shall be paid \$15,000.00 of these funds at the same time as the contractor makes his first construction draw or within 90 days from the date of construction or commencement of construction. 3. \$3000.00 shall be payable by Owner to agent at the time the tenant takes possession of the premises." There is no statement that this is for convenience or to extend the time for payment of said commission.

The facts of the case are clear that a construction loan was never obtained and the Defendant should not be held to owe a commission when it was contemplated that the funds were to be received from that construction loan. The agreement itself provided that the services were to include the construction and lease of said property.

It may be argued that the lease was never consummated nor construction begun because of the activities of the

Defendant but as already been noted the Defendant at no time indicated an unwillingness to proceed but that he was estopped by the acts of a third party. Charles Moore at no time attempted to hinder or interfere with or refused to proceed as an arbitrary measure but was infact prevented by the acts of Rexall Drug.

Rules established by this Court have indicated that a party cannot avail himself of the non performance of a condition precedent when he himself is occasioned its non performance. Cannon vs Stevenson School of Business, Inc. 560 P. 2d. 1383, (Utah, 1977). The Defendant did not occasion a non-performance but it was occasioned by others.

The agreement for the payment of commission was in affect, a special brokerage agreement and contained a condition precedent. The brokers commission was expressly conditioned upon the completion of the lease and financing and the Courts have indicated that unless such performance is prevented by the arbitrary action of the listor, the broker would not be entitled to recover. The actions here were not arbitrary actions of the Defendant, but infact were occasioned by others.

#### CONCLUSION

The Defendant in this action stood fully ready to accept the lessee in this case provided by the broker but was prevented from consummating the lease by the actions of others and not by his own arbitrary actions or refusals. The consummation of the lease and construction financing were conditions precedent to the Defendant's obligation to pay a commission and the failure of such condition was not the arbitrary act or refusal of

the Defendant but the actions of a third party which made it impossible to proceed in this matter.

The Plaintiff has through out maintained that he was entitled to a commission because he had brought a buyer ready, willing and able but infact the conditions set forth in the agreements entered into by the parties were not met and were not met because of the actions of others and not those of the Defendant and therefore are not arbitrary. The equities of this matter would dictate that a commission should not be paid and that the judgment of the Trial Court should be reversed.

DATED this \_\_\_\_ day of December, 1979.

Respectfully submitted,

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