

1980

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

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

KNIGHT REALTY INV. CO., a
Utah Corporation,

Plaintiff-
Respondent,

vs.

CHARLES C. MOORE and
CHARLES C. MOORE d/b/a
SOUTH VILLAGE SHOPPING
CENTER and SOUTH VILLAGE
SHOPPING CENTER and SOUTH
VILLAGE, INC., a Utah
Corporation,

Defendant-
Appellant.

BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT OF THE
DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
HONORABLE ERNEST F. BALDWIN, JR., DISTRICT JUDGE

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Case No. 16550

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SHOPPING CENTER AND SOUTH
VILLAGE, INC., a Utah
Corporation,

Defendant-Appellants.

No. 16550

STATEMENT OF THE NATURE OF THE CASE

Plaintiff-Respondent, Knight Realty, Inv. Co., herein-
after termed Plaintiff, filed an action in the District Court of
the Third Judicial District to enforce a contract for the payment
of a real estate commission based upon a lease of property owned
by Defendant-Appellant, South Village, Inc., hereinafter termed
Defendant.

DISPOSITION IN LOWER COURT

1. The above-entitled matter was tried on April 18,
1979 before the Honorable Ernest F. Baldwin, Jr., a post-trial
memorandum was filed by the Plaintiff pursuant to the Court's
request for memoranda and after due consideration, the District

Court entered Findings of Fact, Conclusions of Law and a Judgment in favor of the Plaintiff and against the Defendant in the amount of Eighteen Thousand Dollars (\$18,000) with interest thereon. (R. 55-63.)

RELIEF SOUGHT ON APPEAL

Appellant, South Village, Inc., seeks a reversal of the judgment of the District Court and an award of Appellant's costs on appeal. Respondent seeks affirmance of the judgment of the District Court and an award of Respondent's costs on appeal.

STATEMENT OF FACTS

Appellant's Designation of Record on Appeal (R.66) specified that a transcript including all exhibits offered and received should be included in the record on appeal. After Appellant's brief had been filed and during the preparation of Respondent's brief, counsel for Respondent discovered that a transcript of the trial was not part of the record on file with the Court. On January 2, 1980, Counsel for Respondent called the reporter, Robert Lewis, concerning the transcript and he stated, after checking his records, that the transcript of the trial of this matter had not been ordered by Appellant.

It is well settled that where the Appellant fails to file a transcript on appeal, the findings of fact of the trial court are presumed to be supported by substantial evidence, and the trial court's conclusions of law will not be overturned on appeal if supported by the findings of fact. Burton v. Garner, 374 P.2d 707 (Colo. 1962); Henry v. Latta, 472 P.2d 694 (Colo. App. 1970); Shedd v. Adamson, 535 P.2d 799 (Nev. 1975); Reliance Ins. Co. v. Marchiondo, 91 N.M. 276, 573 P.2d 210 (1978); Huckaby v. Newell, 519 P.2d 1290 (Ore. App. 1974).

For example, in Burton v. Garner, 374 P.2d 707 (Colo. 1962), the appellant asserted that the findings of fact and judgment were contrary to the pleadings and the evidence, yet the appellant failed to file the record on appeal. The court ruled as follows:

There being no transcript before us we cannot consider this ground of asserted error. In its absence we are bound to presume that the findings and conclusions of the trial court are correct and that the evidence presented supports the judgment. 374 P.2d at 709.

In Reliance Ins. Co. v. Marchiondo, 91 N.M. 276, 573 P.2d 210 (1978) the court stated:

The issue is whether under the state of this record we can justify overturning conclusions of law made by the trial court that appear on their face to be properly supported by the trial court's findings of fact. We think not.

The responsibility for seeing that a proper record is filed for an appeal to this Court is clearly that of the appellant.

. . . .

Basic to the right of appeal is the perfection, certification and filing of the record by the person who intends to rely upon it to support his assertions in the appellate court. [Citations omitted]. The record before us is blank as to whether evidence was adduced in the trial court on the issues here involved or whether there were material rulings made by the judge. We are confronted by the bare fact that no transcript of either evidence or proceedings is before us.

Having neglected to provide a proper record on appeal, Reliance cannot challenge here the correctness of the decision of the trial court. [Citations omitted].

Conclusions of law properly supported by findings of fact will not be overturned on appeal unless it is shown that the facts are not supported by substantial evidence. [Citations omitted]. Here Reliance has failed to provide a record from which such a showing could be made. 573 P.2d at 212-213.

Thus, the Appellant has no basis to challenge the findings of the trial court. Those findings must be deemed conclusive. The facts as outlined in the Findings are as follows:

1. On April 23, 1976 a Real Estate Listing Agreement was executed by Keith Knight on behalf of the Plaintiff and by Charles Moore on behalf of the Defendant which provided that in consideration of the efforts of the Plaintiff to lease certain

property owned by the Defendant to Prudential Federal Savings and Loan Association (hereinafter termed Prudential), Defendant would pay the Plaintiff a commission. (Exhibit 1-P; Findings of Fact, No. 1, R. 56.)

2. On or about the 31st day of August, 1976, the Defendant executed a Lease Option Agreement whereby the Defendant offered to build certain improvements upon the property of the Defendant and to lease the same to Prudential. The property described was located south of the existing First Security Bank Building at approximately 9501 South 700 East in Salt Lake County. (Exhibit 2-P; Findings of Fact, No. 2, R. 56.)

3. On or about the 25th day of February, 1977, the Defendant executed an Extension Agreement which extended the option set forth in Exhibit 1-P and in addition thereto the Defendant reserved the right to improve and lease alternate premises directly north of the existing First Security Bank premises. (Exhibit 3-P; Findings of Fact, No. 3, R. 52.)

4. On or about the 15th day of August, 1977, the Plaintiff and Defendant entered into a further Real Estate

Commission Agreement which provided for the payment by the Defendant to the Plaintiff of a commission in the amount of \$18,000. (Exhibit 5-P; Findings of Fact, No. 4, R. 56.)

5. On or about August 15, 1977, the Defendant entered into an Agreement of Lease with Prudential. The lease described the property north of the First Security Bank building. At the time of execution of the lease by the Defendant, the Defendant endorsed thereon a statement to the effect that Defendant had not yet received all of the tenants' approvals and then stated "if we fail to receive their approval, the location south of the bank will be made available to PFS (Prudential), same size." /s/ Charles C. Moore President. Mr. Moore also signed and noted the inclusion on the last page of the lease of a "subject to clause" awaiting approval of the tenants. (Exhibits 4-P and 6-P; Findings of Fact, No. 5, R. 56-57.)

6. A meeting took place in the offices of Defendant on October 18, 1977. Present at the meeting were Mr. Moore and his son, Mr. Clawson, Mr. Charles Alcott of Prudential and Mr. Keith Knight. At that meeting, there was a discussion with respect to proceeding with the project. Mr. Moore advised the parties present that he was ready to proceed. Reference was made to the

limiting endorsement placed on the last page of the lease (Exhibit 6-P). A line was drawn through the limiting endorsement by Mr. Knight. A further endorsement was placed thereafter that reads "null and void, cancelled". Mr. Moore then signed this further endorsement, thereby eliminating the prior condition. Mr. Clawson was then authorized to proceed with the plans and specifications which he did. On that same date, October 18, 1977 and at that meeting, Prudential delivered to Mr. Moore Prudential's letter dated October 14, indicating "that said lease agreement is now in full force and effect and binding upon the parties." (Exhibit 9-P; Findings of Fact, No. 8, R. 57.)

7. Mr. Moore acknowledged that he did not need the approval of Rexall to complete the improvements for Prudential on the location south of First Security's existing bank building. (Exhibit 10-P; Findings of Fact, No. 9, R. 57-58.)

8. Prudential remained willing to accept either of the two locations. (Findings of Fact, No. 10, R. 58.)

9. Neither Mr. Knight nor Prudential had any notice or knowledge of Defendant's contention that it required approval of the tenants for the north location until on or about August 15, 1977 when Mr. Moore endorsed the limiting condition upon the lease. (Findings of Fact, No. 11, R. 58.)

10. Mr. Moore assured Mr. Knight that Rexall could not prevent the completion of the project since even with Prudential, the Defendant had the minimum amount of parking required by the Rexall lease. Mr. Moore presented to Mr. Knight his computations with respect to the required parking ratios. (Exhibit 16-P; Findings of Fact, No. 12, R. 58.)

11. Arrangements were made for Prudential to provide the financing for the Defendant. The Defendant never made formal application therefor. Ultimately the Defendant failed, neglected, declined and refused to proceed. Prudential then rescinded the lease because of Defendant's nonperformance. (Findings of Fact, No. 13, R. 58.)

12. The trial court found that the Plaintiff had two written commission agreements, the second incorporated by reference into the first, and that the Plaintiff obtained a tenancy for the Defendant upon the terms and conditions acceptable to the Defendant, all as set forth in the Lease Agreement (Exhibit 6-P) which was executed by both the Defendant and Prudential. (Findings of Fact, No. 14, R. 58.)

A R G U M E N T

POINT 1

APPELLANT'S CONTENTIONS OF ERROR
BY THE TRIAL COURT ARE NOT SUPPORTED
BY THE RECORD ON APPEAL.

Appellant contends on appeal that the agreement for the payment of the commission to Plaintiff was conditioned upon the

completion or consummation of the lease and the obtaining of financing and that the failure of such conditions was caused not by the Defendant but by a third party. This contention of the Appellant is at variance with the findings of the Court and is not supported by the record on appeal.

The lease, as originally executed, had a condition endorsed thereon by the Appellant. At a later time, the Appellant eliminated the condition by its further endorsement. The lease was in fact consummated. Furthermore, the lessee remained willing to accept an alternate location which did not require any approval of a third party (Rexall). In addition, the lessee was ready, able and willing to provide the construction financing. Thereafter, the Appellant simply refused to proceed with the construction of the improvements. Contrary to the unsubstantiated statements in the Appellant's brief, the transaction failed not because of some third party impediment but because the Appellant refused to proceed after the Plaintiff had completely performed its service and had effected a lease of the property.

Appellant concedes that the general rule is that a broker's commission is earned once the broker has procured a ready, willing and able buyer, or lessee, and that the commission cannot be defeated by the owner's subsequent refusal to complete the transaction. (Brief of Appellant pp. 4-5). In Curtis v. Mortensen, 267 P.2d 237 (Utah 1954), the Utah Supreme Court held

that the broker is entitled to a commission even though the sale was never consummated.

The proposed purchasers were anxious to buy the property even after respondent's rescission of the earnest money agreement. Their suit for specific performance is ample proof of that fact. There can be no question about their willingness to buy and it was stipulated that they had the financial ability to consummate the sale. The sale was never consummated because the respondents changed their minds and refused to make a binding agreement. Under such circumstances appellants have fulfilled their part of the listing agreement by having produced purchasers who were ready, willing and able to buy the listed property and were entitled to their commission. 267 P.2d at 239.

This rule has been reiterated recently by the Utah Supreme Court in Davis v. Heath Development Co., 558 P.2d 594 (Utah 1976).

[I]f an agent so performs [i.e. obtaining a ready, willing and able buyer], and the sale is not completed because of the lack of cooperation or obstruction by the listor . . . , the agent is nevertheless entitled to his commission. 559 P.2d at 596.

The Plaintiff in this case produced a ready, willing and able lessee as is evidenced by the execution by Prudential of a binding lease agreement. The fact that the lease was not effectuated was not due to any failure on the part of the lessee but was in fact due to the Defendant's refusal to proceed.

POINT II

THE APPELLANT'S OWN CONDUCT PREVENTED THE CONDITION WHICH IT NOW CLAIMS EXCUSES ITS PERFORMANCE.

The Appellant currently notes that the supplemental Real Estate Commission Agreement executed in August, 1977 provided for payment of the commission from the construction loan but then claims that since the construction didn't proceed, the condition wasn't met and that Appellant is thereby relieved from its acknowledged obligation to pay the commission.

It is clear that the provision was not intended to impose a condition precedent to the obligation of payment but merely prescribed a convenient manner or schedule for paying the commission which had already been earned. Assuming, however, that the construction was a condition precedent to the obligation to pay the commission, such condition was excused or waived because the Appellant actually prevented the construction.

Appellant concedes that "no one can avail himself of the non-performance of a condition precedent who has himself occasioned its non-performance." Cannon v. Stevens School of Business, Inc., 560 P.2d 1383, 1385 (Utah 1977). (Brief of Appellant p. 7).

The case of Hoyt v. Wasatch Homes, 261 P.2d 927 (Utah 1953) is particularly relevant. In Hoyt, it was agreed that the broker's commission would be paid only if the sale were

consummated. The sale was not consummated, the earnest money agreement between the seller and the buyers having been mutually rescinded. The court held that the broker was entitled to his commission notwithstanding the fact that the condition of consummation was not satisfied.

We are therefore impelled to the conclusion that the only reasonable interpretation of the facts and circumstances shown is alternative (b): That the Johnsons had not failed in their obligations so as to subject them to forfeiture, and were ready, willing and able buyers. Under such circumstances, Hoyt could not by refusal to cooperate, defeat the Defendant's right to its commission. And we say this advisedly, notwithstanding the finding of the trial court, that when Hoyt originally engaged the Defendant to sell the property, it was agreed that the commission would be paid only if a sale were consummated.

That agreement certainly contemplated that the Plaintiff would cooperate in good faith toward the accomplishment of the purpose for which he employed Defendant. He cannot be permitted to procure them to obtain a buyer, on terms accepted by the Plaintiff, and then prevent the accomplishment of what he requested and authorized them to do by arbitrarily refusing to perform his part of the transaction. Under such circumstances, he will not be heard to complain of their failure to do that which he prevented. 261 P.2d at 930.

Appellant contends however, that the failure was not caused by the Defendant but was in fact caused by Rexall's refusal

to consent. (Brief of Appellant pp. 4-5). This position is untenable under the facts. Under the terms of the Extension Agreement (Exhibit P-3), the Defendant had the option to lease either of two locations to Prudential. Prudential remained willing to accept either of the two locations. The alternative location was not subject to the consent of prior tenants. Thus, it was the Defendant's own action that created the necessity of obtaining Rexall's consent. The Appellant could have avoided that problem by simply moving to the other location which was acceptable to Prudential and over which Rexall exercised no control.

In any event, the Defendant's failure to obtain consent does not relieve it from the obligation to pay the commission. It has long been held that the seller's inability to transfer good title does not defeat the broker's right to a commission where the broker had no notice of the defect in title. See, e.g., Little v. Fleishman, 101 P. 984 (Utah 1909); Stewart v. Lesin, 302 P.2d 714 (Utah 1956).

Neither the Plaintiff nor the lessees had any notice that the consent of Rexall might be necessary until August 15, 1977 when the Defendant added the consent condition to the lease agreement and even then the Defendant assured the Plaintiff that Rexall's consent would not be necessary. This consent condition was later nullified and cancelled by the Defendant and thus is of no effect.

The cancellation of this condition left intact and unconditional the assertion on page one of the Agreement of Lease (Exhibit P-4) that the Defendant was the fee owner of and entitled to lease the subject property. If the Defendant in fact was unable to lease the property because of lack of consent or any other reason, such inability would not constitute a defense either to its obligation to lease the property or to its obligation to pay the Plaintiff's commission.

The case of Bradley v. Westerfield, 402 P.2d 577 (Ariz. 1965), is similar factually to the present case. In Bradley, the broker was held to be entitled to a commission on the sale of a bar even though the sale fell through because the second mortgage holder refused to consent to the sale. The court held as follows:

The Defendant [vendor] knew, or should have known that there existed a restriction on the transfer of the license in favor of the second chattel mortgagee. In order to deliver merchantable title, the duty to obtain his consent devolved upon her. Her inability or neglect to procure this consent did not relieve her from the obligation to pay to plaintiff the realty commission. 402 P.2d at 579-80.


CONCLUSION

There is no basis in the record on appeal upon which Appellant can challenge the conclusion of the trial court that

the Plaintiff fully performed its obligation of procuring a ready, willing and able lessee and thus earned the agreed commission of \$18,000. The failure of the transaction subsequent to the execution of the lease was not due to any third party but was due solely to the Defendant's refusal to proceed. Therefore, the judgment of the trial court should be upheld.

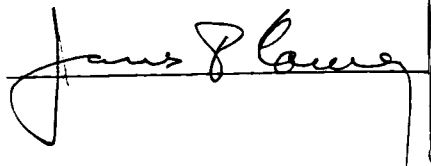
RESPECTFULLY SUBMITTED this 16 day of January, 1980.

WATKISS & CAMPBELL


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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing BRIEF OF RESPONDENT were served upon the Defendant and Appellant South Village, Inc. by mailing the same, postage prepaid, to Thomas P. Vuyk, Esq., 425 South Fourth East, Suite 100, Salt Lake City, Utah 84111, this 16 day of January, 1980.

A handwritten signature in black ink, appearing to read "James P. Lawrence", is written over a horizontal line.