

1953

Richard Hoyt and Maude S. Hoyt v. Wasatch Homes, Inc. : Brief of Appellant

Utah Supreme Court

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Case No. 7919

IN THE SUPREME COURT
of the

STATE OF UTAH FILED

FEB 20 1953

RICHARD L. HOYT and MAUDE S. HOYT, Supreme Court, Utah

Plaintiffs and Respondents,

— vs. —

WASATCH HOMES, INC., a Utah Corporation,

Defendant and Appellant.

BRIEF OF APPELLANT

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STATE OF UTAH

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HOYT,

Plaintiffs and Respondents,

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WASATCH HOMES, INC., a Utah
Corporation,

Defendant and Appellant.

Case No.
7919

BRIEF OF APPELLANT

PRELIMINARY STATEMENT

Throughout appellant's brief respondents will be referred to as "plaintiffs" and appellant will be referred to as "defendant."

STATEMENT OF FACTS

This appeal grows out of an action for the return of \$1000.00 which had been paid to appellant by Elmer J. Johnson and Beatta C. Johnson, purchasers under an Earnest Money Receipt and Agreement, which was exe-

cuted by plaintiffs, and was procured by defendant through its agent, DeWayne C. Anderson. The Earnest Money Receipt and Agreement is Exhibit "A".

Defendant retained the \$1000.00 paid to it by the Johnsons, claiming the payment as a part of the commission due from the sellers under the terms of the Earnest Money Receipt and Agreement.

Plaintiffs filed their complaint seeking return of the \$1000.00; defendant answered and counterclaimed, claiming an additional amount due it in the sum of \$300.00.

Plaintiffs' complaint alleges that there was a verbal agreement that plaintiffs would pay to defendant \$1300.00 for services rendered in the sale of the real property if defendant would cause a fully consummated sale to be transacted within a reasonable time. Plaintiffs also allege the making of the Earnest Money Receipt and Agreement and attach a copy of it to their complaint. They also allege that the sale was never consummated and the Johnsons entered into an agreement by which the Johnsons relinquished all interest which they had in the property covered by the Earnest Money Receipt and Agreement.

Defendant, in its answer and counterclaim, admits that there was an agreement to pay five per cent commission on the sale of the property covered by the Earnest Money Receipt and Agreement, and admits the receipt of \$1000.00 from the Johnsons (purchasers) under said Exhibit "A". Defendant also admits the execution of Exhibit "A" and the rescission by plaintiffs and the purchasers counterclaiming for the \$300.00 difference between

\$1000.00 and \$1300.00, five per cent of the purchase price.

The court, after trial, found that there was an oral agreement to list the property; that the price for the property was \$26,000.00 and that the commission was to be five per cent of the sale price, or \$1300.00; that the oral agreement contemplated a fully consummated sale within a reasonable time. It found that the Earnest Money Receipt and Agreement was executed on the 25th of April, 1951; that defendant received \$1000.00 from the purchasers as a down payment on the purchase price at the time that the Earnest Money Receipt and Agreement was signed. It was also found that the signatures of the Johnsons were secured by defendant. The court then found that negotiations continued between the Johnsons and plaintiffs looking to a fully consummated sale, but that the sale was never consummated, and on the 19th of February, 1952, the Johnsons relinquished to plaintiffs all their right, title and interest in the property by reason of the Earnest Money Receipt and Agreement and plaintiffs reimbursed Johnsons for the \$1000.00 which they had paid to defendant. The court then concluded that plaintiffs were entitled to the return of the \$1000.00 paid under the Earnest Money Receipt and Agreement.

The evidence introduced showed without dispute that after the Earnest Money Receipt and Agreement was signed plaintiffs and the purchasers began to work diligently to put the property covered by the agreement into shape for transfer by the sellers to the purchasers. The property covered was to be made into a subdivision

known as the "Indian Rock Subdivision" and approval of said subdivision was necessary. The seller, under the agreement, had agreed to annex the subdivision to the city.

Approximately two months after the Earnest Money Receipt and Agreement was signed, plaintiffs and the purchasers, at the suggestion of plaintiffs, decided to draw up a contract complying with the terms of the Earnest Money Receipt and Agreement, and in order to do this they contacted Mark Eggertsen of the Security Title Company of Salt Lake City (R. 16, 17). Mr. Hoyt, one of the plaintiffs, requested the help of Mr. Eggertsen in the perfecting of the proposed subdivision and agreed with him that if he would give the plaintiffs and Johnsons help they would allow him to write the title insurance on the lots as they sold them (R. 17).

A memorandum of the terms of the uniform real estate contract was drawn by Eggertsen at a conference with plaintiffs and purchasers. Prior to the time of the consultation between plaintiffs, Eggertsen and purchasers, Plaintiff Hoyt informed defendant that it was not necessary for defendant's Agent Andersen to participate in the conferences with Eggertsen and that they would handle the further transactions on the preparation of the uniform real estate contract through Eggertsen. After this information defendant made no further efforts or attempts to have a uniform real estate contract drawn or signed up (R. 66).

Plaintiffs and the Johnsons continued to work on the sale contract. On the 26th day of January, 1952, plain-

tiffs served upon the purchasers a notice, copy of which is Exhibit "2". In said notice plaintiffs state that the Johnsons had breached the terms of the Earnest Money Receipt and Agreement and failed and neglected to pay the \$6000.00 required by said agreement within sixty days from the date of the agreement. The notice also states that purchasers had failed to agree with the sellers on the necessary provisions, terms and conditions of the proposed sale and purchase of said property. The notice makes demand upon purchasers for a payment of \$6000.00 and the assumption of responsibility for certain improvements in the subdivision, demanding performance of these duties by purchasers within five days.

In response to the Notice (Exhibit "2") the purchasers, it was stipulated, tendered to the sellers \$6000.00 and sellers refused the tender, stating that they would not accept the payment required by the Earnest Money Receipt and Agreement. Thereafter, the sellers and purchasers executed an agreement rescinding the Earnest Money Receipt and Agreement, copy of said agreement being Exhibit "C". In it sellers agreed to refund to purchasers \$1000.00 which they had received through defendant, and the purchasers and sellers each released and discharged each other from any claims, demands, accounts and proceedings whatsoever which grew out of or in any way were connected with the Earnest Money Receipt and Agreement. This agreement was signed on the 19th of February, 1952, nearly ten months after the Earnest Money Receipt and Agreement was executed.

The Earnest Money Receipt and Agreement contains a provision that it was made in lieu of a formal contract of purchase incorporating necessary provisions for the understanding and protection of both buyer and seller, and terms and conditions contained in it were subject to adjustment agreeable to both parties. It provided for the payment of \$1000.00 down on the total price of \$26,000.00 and for a balance to be paid of \$6000.00, the final contract of sale to be drawn within sixty days after the execution of the Earnest Money Receipt and Agreement. The Earnest Money Receipt and Agreement also contains the following provision (Exhibit "A", lines 34 and 35):

"The seller agrees in consideration of the efforts of the agent in procuring a purchaser, to pay said agent the rate of commission recommended by the Salt Lake Real Estate Board."

There does not seem to be any uncertainty as to the right of the agent under the Earnest Money Receipt and Agreement and there is no dispute that the commission, recommended by the Salt Lake Real Estate Board, is five per cent of the sale price.

STATEMENT OF POINTS RELIED UPON

1. Under the Earnest Money Receipt and Agreement (Exhibit "A") defendant, upon execution, became entitled to a commission of \$1300.00 for the efforts which it had put forth in procuring a purchaser for plaintiffs' property.

2. That defendant produced purchasers who were ready, willing and able to purchase the property of sellers under the terms and conditions of the Earnest Money Receipt and Agreement, and the purchasers so produced remained ready, willing and able at all times to purchase said property under said terms.

3. That plaintiffs accepted the purchasers obtained by defendant and the terms of the Earnest Money Receipt and Agreement were terms which they dictated and agreed to. After the Earnest Money Receipt and Agreement was executed, plaintiffs relieved defendant of any further obligations in the consummation of the sale and undertook to carry on all further negotiations and transactions personally.

SUMMARY OF ARGUMENT

POINT I.

UNDER THE TERMS OF THE EARNEST MONEY RECEIPT AND AGREEMENT DEFENDANT IS ENTITLED TO A REAL ESTATE COMMISSION OF \$1300.00.

POINT II.

PURCHASERS PROCURED BY DEFENDANT REMAINED READY, WILLING AND ABLE AT ALL TIMES TO PURCHASE THE PROPERTY COVERED BY THE EARNEST MONEY RECEIPT AND AGREEMENT, BUT PLAINTIFFS REFUSED TO GO FORWARD WITH THE SALE.

POINT III.

PLAINTIFFS RELIEVED DEFENDANT OF ANY OBLIGATION TO GO FORWARD WITH THE TRANSACTION AND

PROCURE A UNIFORM REAL ESTATE CONTRACT OR CONSUMMATE THE SALE, AND A COMMISSION OF \$1300.00 BECAME DUE AND OWING AT THAT TIME.

ARGUMENT

POINT I.

UNDER THE TERMS OF THE EARNEST MONEY RECEIPT AND AGREEMENT DEFENDANT IS ENTITLED TO A REAL ESTATE COMMISSION OF \$1300.00.

The Earnest Money Receipt and Agreement contains the following provision (Exhibit "A", lines 34 and 35) :

"The seller agrees in consideration of the efforts of the agent in procuring a purchaser, to pay said agent the rate of commission recommended by the Salt Lake Real Estate Board."

It is defendant's position that when Richard R. Hoyt and Maude S. Hoyt, his wife, executed the Earnest Money Receipt and Agreement it became entitled to a commission of five per cent of the purchase price of \$26,000.00. The Earnest Money Receipt and Agreement provides that its terms constitute the entire preliminary contract and that no verbal statements made by the representative are to be a part of the transaction unless incorporated therein.

The court found that there had been a prior oral agreement between defendant and plaintiffs by which plaintiffs had agreed to pay the commission for a fully consummated sale. Even though that be the fact, the Earnest Money Receipt and Agreement superseded the

oral agreement and was executed after the oral agreement. The Earnest Money Receipt and Agreement also contains the following provision concerning retention of the \$1000.00 paid them by the purchasers (Exhibit "A", lines 29 and 30) :

"In the event the purchaser fails to pay the balance of said purchase price or complete said purchase as herein provided, the amounts paid hereon shall, at the option of the seller, be retained as liquidated and agreed damages."

Under this provision it is defendant's position that plaintiffs were fully protected against any loss. The down payment had been paid in cash and was in the hands of defendant as a real estate broker and agent. This would be true under any circumstances where the purchaser failed to complete the purchase. Plaintiffs, however, do not rely on this provision of the Earnest Money Receipt and Agreement. After the purchasers failed to complete the purchase, instead of retaining the \$1000.00 and forfeiting it, as sellers had a right to do under the quoted terms of the Earnest Money Receipt and Agreement, the sellers returned to purchasers the \$1000.00 which was paid as a down payment. Defendant believes that this shows beyond doubt that plaintiffs knew the purchasers were willing to go through with the transaction and that the failure of the sale to be consummated was not due to any default by them or lack of willingness to go forward. The position of the various parties was demonstrated by the following incident: There was a conference held between

purchasers, plaintiffs and defendant, at which time a discussion was had of the right of purchasers to the return of their \$1000.00 deposit and the repayment of that amount by defendant to plaintiffs. An oral agreement was made between all of the parties, defendant agreeing to return the \$1000.00 to plaintiffs, and plaintiffs agreeing to return it to the purchasers if plaintiffs would list the lots in the Indian Rock Subdivision for sale by defendant. The conversation occurred after the service of Exhibit "2" and before the signing of Exhibit "C" (R. 26, 27). This agreement failed for plaintiffs would not agree to the listing of the lots with defendant, and defendant refused categorically to return the \$1000.00 which it had received from the purchasers unless a listing was given (R. 27, 28). After this conversation plaintiffs and the purchasers entered into the agreement (Exhibit "C"), and purchasers received back from plaintiffs all of the funds which they had invested and paid under the Earnest Money Receipt and Agreement.

To allow the seller of real property, after having obtained the services of a real estate broker, on his own initiative and without the consent of the broker, to rescind the sale voluntarily, returning the down payment, to then deprive the broker of any right to the commission which had been earned under the sale, would place the broker entirely at the mercy of the seller. Such is not the law. Where the purchaser remains ready, willing and able to purchase, and the seller refuses to go forward with the sale, or the sale is mutually rescinded by purchaser and seller, the broker's right to a commission remains unaf-

fect. *Equitable Life Assur. Soc. of United States v. Home*, 184 Okl. 542, 88 P. 2d 887; *Fiske et al. v. Soule*, 87 Cal. 313, 25 Pac. 430; *Knowles v. Henderson*, 156 Fla. 31, 22 So. 2d 384; *Rose v. Gardner et al.*, 130 Cal. App. 302, 19 P. 2d 1009. See 169 *A.L.R.* 605 for annotation and collected cases.

POINT II.

PURCHASERS PROCURED BY DEFENDANT REMAINED READY, WILLING AND ABLE AT ALL TIMES TO PURCHASE THE PROPERTY COVERED BY THE EARNEST MONEY RECEIPT AND AGREEMENT, BUT PLAINTIFFS REFUSED TO GO FORWARD WITH THE SALE.

In the preceding point defendant has recited the evidence which demonstrates beyond any doubt that the purchasers were always ready, willing and able to go forward with the proposed sale and to comply with all of the terms of the Earnest Money Receipt and Agreement. There is no contention at any place that purchasers defaulted, reneged or in any way attempted to get out of the Earnest Money Receipt and Agreement which they had entered into.

It is undisputed that there was an entire agreement between plaintiffs and the purchasers on all of the details of the sale of the subdivision. Exhibit "1", the Memorandum drawn up by Eggertsen, shows that the details had all been arranged and agreed upon. Plaintiff, Richard R. Hoyt, testified that the terms set down by Eggertsen were acceptable to him (R. 22, 23). Only two details remained to be ironed out, and both of them went to the

question of performance. Hoyts wanted to inspect the property on which they were to have a deed to secure performance by purchasers, and they also wanted purchasers to obtain a bond to be placed with the city to insure that the improvements would be paid for. Both of these matters strictly concerned performance. As to the inspection of the property in Bozeman, plaintiffs never inspected it and from all that appears from the record it was more than ample to secure the \$19,000.00 contract balance and would have been entirely acceptable.

Regarding the bond, the purchasers both testified that they were able to secure a bond and had arranged for a cash bond to be placed with Salt Lake City to insure payment on the subdivision improvements (R. 50, 51). The purchasers testified further that they were able to perform all of the obligations incumbent upon them under the agreement to purchase (R. 51).

The conduct of the parties shows clearly the willingness of purchasers at all times to go forward with the transaction covered by the Earnest Money Receipt and Agreement. On the 26th of January plaintiffs served purchasers with Exhibit "2". This was a notice that unless payment was made under the terms of the Earnest Money Receipt and Agreement within five days that plaintiffs would forfeit the interest of purchasers in the Earnest Money Receipt and Agreement. In response to said notice, the purchasers made an offer of tender of the \$6000.00 balance due on the down payment and were informed that such a tender would not be acceptable and that the plaintiffs would not go forward with the trans-

action. After this offer of tender, plaintiffs obtained a release of the purchasers' interest in the premises, but only upon an agreement to refund to them the \$1000.00 which had been paid as a down payment on the proposed purchase. This agreement, Exhibit "C", was not executed until the 19th of February, 1952. Defendant was not consulted by the parties in their arrangement to rescind the transaction and the mutual release which is contained in Exhibit "C".

The law covering mutual rescissions by the seller and purchaser is clear. The broker, under such circumstances, is entitled to his commission and the mutual rescission in no way affects his rights. It is equally clear that where the seller defaults or his failure is the primary cause of the collapse of the sale, the broker is entitled to his commission and the seller's default or failure to perform can in no way affect that right. *S. H. West & Co. v. Wagner*, 4 P. 2d 276, 117 Cal. App. 523; *Lesser v. W. B. McGerry & Co.*, 8 P. 2d 1058, 121 Cal. App. 193.

Even where no enforceable contract has been tendered by the broker, if the seller refuses to go forward with the transaction, which has been arranged and entered into an enforceable purchase contract, the broker has been held to be entitled to a commission. *Ward v. McKenney*, 4 P. 2d 108, 151 Okl. 242; *Hubbard v. Ryals*, 187 Okl. 6, 100 P. 2d 843.

Defendant submits that under the undisputed evidence a finding would be required that the purchasers remain ready, willing and able at all times to consummate and go forward with the sale of the Indian Rock Sub-

division under the terms agreed to by plaintiffs, but that plaintiffs refused to proceed with the sale and negotiated a mutual rescission of it. It is submitted that under such circumstances the law requires that the broker be paid his commission in full.

POINT III.

PLAINTIFFS RELIEVED DEFENDANT OF ANY OBLIGATION TO GO FORWARD WITH THE TRANSACTION AND PROCURE A UNIFORM REAL ESTATE CONTRACT OR CONSUMMATE THE SALE, AND A COMMISSION OF \$1300.00 BECAME DUE AND OWING AT THAT TIME.

The evidence shows, without dispute, that plaintiffs and the purchasers relieved defendant of any further duty in closing and consummating the sale of the Indian Rock Subdivision. Both plaintiffs and purchasers arranged with Eggertsen, of the Security Title Company, to assist them in drawing a uniform real estate contract and to write title insurance on the lots covered by the sale (R. 17). This conduct on the part of the plaintiffs and purchasers relieved defendant of any duty which he had to go forward with the transaction and prepare the closing documents and uniform real estate contract. The plaintiffs assumed the duty of closing the transaction. There was certainly an acceptance by them of the purchasers obtained by defendant. Their conduct in a definite and positive way indicates that plaintiffs believed defendant had performed all the services required of it under the oral listing. The law seems to be clear under such circumstances that even though there is not a speci-

fically enforceable contract executed, and even though the buyer repudiates or fails to complete the purchase, the broker is entitled to be paid for his services by the seller. *Simmons v. Libbey*, 53 N.M. 362, 208 P. 2d 1070; *Jutras v. Boisvert*, 121 Me. 32, 115 A. 517. See also annotation at 12 *A.L.R.* 2d 1410 at 1431.

Plaintiffs requested no further action by defendant and dealt directly with the purchasers from the time of the transaction with the Security Title Company, early in September, 1951 (R. 46), until the rescission in February of 1952. Defendant submits that this proves beyond dispute that there was a complete acceptance of the purchasers and an assumption of the responsibility for the closing of the transaction.

The most recent case similar in many details to the case at bar is *Simmons v. Libbey*, 53 N.M. 362, 208 P. 2d 1070, 12 *A.L.R.* 2d 1404. There, as in the present case, the seller accepted the purchaser and took over the negotiations with him. The purchaser, however, defaulted, and the transaction was not consummated. The New Mexico Court held that under such circumstances the broker was entitled to his commission. Under the principles of the *Simmons* case, when the purchaser remains ready, willing and able and the failure of consummation is attributable to reluctance on the part of the seller to complete the transaction, there could be no doubt that a commission was earned by the broker.

Defendant has been unable to find any cases which would indicate a contrary disposition by American courts. In *Russo v. Slawsby et al.*, 84 N.H. 89, 146 A. 508, there

was an oral contract of sale, the buyer remained ready, willing and able, but seller refuses, held broker entitled to his commission. In *Lombard v. Sills, et al.*, 170 Mo. App. 555, 157 S.W. 93, the agent presented a purchaser to the vendor and mutually agreeable terms were arranged, the purchaser being accepted by the seller. Thereafter, it appeared that the purchaser was not financially able to consummate the sale. It was held that the acceptance of the purchaser by the seller completed the transaction as far as the broker was concerned and that he was entitled to his commission and did not in any way warrant that the prospective purchaser was financially able to pay for the property which he agreed to buy. In *Leuschner v. Patrick* (Tex. Civ. App.), 103 S.W. 664, the agent obtained a buyer and turned him over to the seller to complete the deal. All of the details were arranged and worked out when it appeared that the prospective purchaser was financially unable to complete the transaction. The Texas Court held that the seller had accepted the buyer and could not complain about the financial inability, the agent having fulfilled his duty and was therefore entitled to collect his commission.

In *Jutras v. Boisvert, supra*, the Supreme Court of Maine held that where a person found by the broker and presented as a purchaser was accepted by the seller and the seller conducted negotiations with him which resulted in modification of the original agreed terms, even though the proposed purchaser thereafter withdrew, the broker was entitled to his broker's commission. In all of the cases cited the purchaser presented by the broker was the party

who defaulted or withdrew from the transaction causing a failure of the sale to be consummated.

In the case at bar the seller was the cause of the failure of the transaction to be consummated. The testimony of the purchasers is that they were anxious, willing, and at all times able to purchase the property.

It appears from the record that the only reason the purchasers agreed to rescission was that they did not wish to get into a transaction where the other party showed hostility toward them from the very beginning.

It is submitted, that under the circumstances where the seller is reluctant and the moving party in the obtaining of a rescission, where he has accepted the purchaser and dealt with him for over ten months, taking over the negotiations and employing other help in the drawing of the final documents of sale, that the broker who negotiated the original sale and produced the ready, willing and able purchaser, is entitled to his commission as matter of law.

CONCLUSION

Defendant respectfully submits that the decision of the trial court is against law and the undisputed evidence; that defendant is entitled to \$1300.00 real estate commission; that this Court should order the judgment set aside and the entry of judgment in favor of defendant and against the plaintiffs in the sum of \$1300.00.

Respectfully submitted,

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Received copies of Brief of Appellant
this day of February, A.D. 1953.

*Counsel for Plaintiffs and
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