

1953

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

Utah Supreme Court

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Romney & Nelson; Counsel for Plaintiffs and Respondents;

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1919

IN THE SUPREME COURT
of the
STATE OF UTAH

FILED

MAR 12 1953

RICHARD R. HOYT AND
MAUDE S. HOYT,
Plaintiffs and Respondents,

vs.

WASATCH HOMES, INC., a
Utah Corporation,
Defendant and Appellant

Clerk. Supreme Court, Utah

Case No.
7919

BRIEF OF RESPONDENTS

ROMNEY & NELSON
*Counsel for Plaintiffs and
Respondents*
212 Kearns Building
Salt Lake City, Utah

STATEMENT OF FACTS.

STATEMENT OF POINTS RELIED UPON

ARGUMENT

POINT I. The earnest money receipt and agreement (Exhibit "A") is too indefinite and uncertain to constitute an enforceable agreement, and, therefore, defendant is not entitled to any commission for the sale of plaintiff's property.

POINT II. Exhibit "1" was not subscribed by either of the parties to the said proposed sale and is, therefore, void under the statute of frauds.

POINT III. The defendant failed to produce purchasers who were ready, willing and able at any time to purchase the said property under any terms or conditions agreeable to the plaintiffs

POINT IV. The plaintiffs at no time accepted the said purchasers, and there was never any meeting of minds between the said purchasers and the plaintiffs as to the terms or conditions of the payment of the purchase price of the said property

CONCLUSION

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RICHARD R. HOYT AND
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Defendant and Appellant

Case No. 7919

BRIEF OF RESPONDENTS

STATEMENT OF FACTS

Plaintiffs agree with defendant's statement of facts except in the following particulars:

1. Although plaintiffs did agree to "obtain annex to city," it should be borne in mind that the undisputed evidence shows that plaintiffs did obtain such annexation

(R. 21), and that the buyers were required to obtain the bond for the improvements, but failed to do so. (R. 22, 30, 36, 38, and and 41) and that they never advised plaintiffs that they were able to furnish a bond (R. 58).

2. Plaintiffs and the purchasers did not decide, approximately two months after the earnest money receipt and agreement was signed, to draw up a contract as alleged in defendant's brief, and no such agreement was ever drawn. They did discuss with Mark Eggertsen some proposals looking to the final consummation of the agreement, but they came to no meeting of the minds and the discussion was merely preliminary, according to the testimony of Richard R. Hoyt (R. 19), and the memorandum, Exhibit "1," according to the testimony of Mark B. Eggertsen, was merely a copy of a memorandum of some notes made by Eggertsen while the matter was being discussed, and was merely preliminary, and "there were too many indefinite points that we couldn't reduce it to contract at that time" (R. 34, 35, 36 and 38).

3. Beatta C. Johnson, one of the signers as "purchaser" of the earnest money receipt and agreement, Exhibit "A," at all times of the transactions mentioned, namely between April, 1950 and June 1952, was employed by the defendant company as a real estate broker. (R. 51 and 52).

4. Exhibit "2" was prepared and served upon the buyers long after it became apparent that the parties could not agree upon the terms or amounts of the payments required to be made, and called for payment of the full balance of \$25,000.00, and not merely the \$6,000.00 as set forth in defendant's statement of facts.

STATEMENT OF POINTS RELIED UPON

1. The earnest money receipt and agreement (Exhibit "A") is too indefinite and uncertain to constitute an enforceable agreement, and, therefore, defendant is not entitled to any commission for the sale of plaintiff's property.

2. Exhibit "1" was not subscribed by either of the parties to the said proposed sale and is, therefore, void under the statute of frauds.

3. The defendant failed to produce purchasers who were ready, willing and able at any time to purchase the said property under any terms or conditions agreeable to the plaintiffs.

4. The plaintiffs at no time accepted the said purchasers, and there was never any meeting of minds between the said purchasers and the plaintiffs as to the terms or conditions of the payment of the purchases price of the said property.

ARGUMENT

Point I

The earnest money receipt and agreement (Exhibit "A") is too indefinite and uncertain to constitute an enforceable agreement, and, therefore, defendant is not entitled to any commission for the sale of plaintiffs' property.

The earnest money receipt and agreement (Exhibit "A") was prepared on the printed form commonly used

by real estate brokers to acknowledge receipt of a down payment on the proposed purchase of real estate. The printed matter on the form obviously is designed, in part at least, to protect the real estate agent in his commission. Hence the provision for payment of said commission in the printed portion of the form. Despite that fact, however, it cannot be successfully contended that the agent has earned a commission unless he has consummated a sale. The said Exhibit "A" does recite the payment of the \$1,000.00 as earnest money, and the total purchase price of \$26,000.00, and the \$6,000.00 within sixty days, but fails to reveal any information whatever as to how or when the balance of \$19,000.00 shall be paid. The only recital concerning the said payment is as follows: "The balance of the purchase price shall be paid as follows: \$6,000.00 when seller approves the sale, \$———— on delivery of deed or final contract of sale which shall be on or before 60 days from date 19— earnest money receipt made in lieu of formal contract of purchase incorporating necessary provisions for the understanding and protection of both buyer and seller, and terms & conditions contained herein subject to adjustment agreeable to both parties."; also: "contract of sale or instrument of conveyance to be made on the approved form of the Salt Lake Real Estate Board in the name of Elmer J. Johnson and Beatta C. Johnson, husband and wife."

We respectfully submit that upon the basis of such unsatisfactory and indefinite provisions there did not exist any meeting of the minds of the parties as to when or how or in what amounts the said \$19,000.00 would be paid. Such details were without question left for subsequent

determination, and without such determination there is no contract. If either the buyers or the sellers attempted to enforce this agreement they would be powerless to determine what their respective rights or obligations were, and consequently there would be nothing left to enforce.

In *Massie v. Chatom* (1912) 163 Cal. 772, 127 P 56, a broker was held not to be entitled to a commission for a sale of land by the production of prospective purchasers who entered into and later repudiated a written memorandum or agreement embodying the terms arrived at by the parties, where it was not specifically enforceable on behalf of the owner because it was undisputed by all that it was not intended to be a contract of sale but a mere memorandum of price to be used in future negotiations, with the result that, if the agreement upon its face appeared to be more than such a memorandum it was the result of a mutual mistake of the parties, neither of whom could have successfully invoked the aid of a court of equity for specific performance, each, rather being entitled to reformation.

An agreement between prospective purchasers of real estate and the owner, although embodying substantially the essential terms of sale and the previous negotiations, cannot be construed to be a binding and enforceable contract if it bears upon its face language, and is made under circumstances, justifying only the conclusion that it is tentative and temporary and not intended to serve as the final contract of sale, and, upon the withdrawal of the proposed purchasers from the transaction, the broker who produced them cannot be considered to have earned his

commission by obtaining purchasers. *Folinsbee v. Sawyer* (1898) 157 NY 196, 51 NE 994.

Although the essential terms of a sale of land are agreed upon between the owner and his broker's customer, where references to the details of the manner of making payments of the consideration and other circumstances attendant upon the negotiations evince an intention of the parties that the agreement is informal and that a further agreement is to be entered into, the fact that the informal agreement is so far insufficient because of the omissions mentioned as to be incapable of specific enforcement may be regarded as decisive against recovery of the broker's claim for a commission against the owner, in the event the customer refuses to proceed with the transaction under a contract listing the property "for sale." *Measell v. Baruch* (1929) 152 Va. 460, 147 SE 203.

A contract or agreement which is incomplete because it fails to establish mutuality of obligation essential to specific performance, or to impose a binding duty upon the purchaser, by reason of which that remedy would be ineffectual, does not furnish a basis for the claim that a broker has earned a commission by producing an eligible purchaser or induced a sale.

In *Kampf v. Dreyer* (1907) 119 App. Div. 134, 103 NYS 962, a broker employed "to secure a purchaser," who brought to the owner of land a person who obtained from him a written agreement to sell it, but who made no agreement to buy it, and afterwards refused to sign an agreement or take a deed, was held not to be entitled to a commission.

And in *Yeager v. Kelsey* (1891) 46 Minn. 402, 49 NW 199, overruled on another point in *Western Land Asso. v. Banks* (1900) 80 Minn. 317, 83 NW 192, a broker was held not to have earned a commission for selling land for a specified price, to be measured by a stated percentage, simply by taking a deposit from a prospective purchaser, without further procuring any instrument obligating him to purchase, who, after examining the title, refused to accept a deed of conveyance from the owner.

In *McKelvy v. Milford* (1948, La. App.) 37 So. 2nd 370, a broker was held not to be entitled to a commission where property was listed "for sale" at an asking price of \$8,500 in cash, purchasers who had only \$1,500 to apply on the price attempted, at the broker's suggestion, to procure an FHA loan secured by a mortgage on the property, and signed what was referred to as an agreement to purchase but actually amounted only to a memorandum expressing a consideration of \$8,500, "terms FHA loan balance cash," and delivered a \$500 check described as earnest money to be applied on the sale price should it be consummated, and the owner signed the memorandum and indorsed and delivered to the broker the check, but the FHA would only grant \$5,200.00, whereupon the purchasers being unable to acquire additional cash, notified all concerned that no further efforts would be made to acquire the property. The Court considered that the broker was not entitled to recover a commission under a provision in the memorandum that it was "agreed by the parties to this contract that the commission of the (broker) is earned upon the signing of this contract by both parties to it, and may be deducted from the money

herein receipted for," especially where the contract was later cancelled by mutual agreement between the owner and proposed purchaser because of the latter's financial inability to purchase, and itself conferred no tangible contractual rights and was not specifically enforceable and could not be construed as conferring upon the broker any right to a commission, "simply from the signing" thereof, because the provision, under such circumstances, would lead to "absurd consequences" and was "unconscionable."

In *Mason v. Small* (1908) 130 Mo. App. 249, 109 SW 822, the right of a broker to a commission was held not to be established where his obligation required him to find a customer who would exchange real estate for personal property, and he procured such a customer, who entered into a contract which was not enforceable under the statute of frauds because of complete failure to give adequate description of the land which he owned, and the landowner refused to complete the contract, an enforceable agreement being considered contemplated in order to protect the principal.

In *Kraus v. Campe* (1946) 328 Ill. App. 37, 65 NE 2d 127, the court held that a prospective purchaser who failed to complete a purchase of real estate was entitled to recover a deposit on the purchase price made with a broker, where it appeared that the owner and prospective purchaser, through the original efforts of the broker, had agreed upon the terms and entered into a contract unenforceable because of uncertainty in the description, which was of such a character and so seriously defective as not to permit the introduction of oral or extrinsic evidence to supplement it, although the failure to complete the

transaction was attributable to the prospective purchaser's delay, the theory being that a real-estate broker has not earned a commission by the negotiation of an unenforceable contract of sale.

In *Frischkorn Real Estate Co. v. Hinckley* (1924) 227 Mich. 399, 198 NW 882, a real estate broker was held not to be entitled to a commission, although he delivered \$200.00 as a deposit and first payment on the purchase price of the owner's property and obtained a receipt stating that the price was \$23,000.00, \$8,000.00, including the deposit, to constitute a down payment "when deal is closed" the balance to be payable in installments, whereby the owner agreed to deliver a land contract for the property and close the deal within ten days from receipt of abstract and not less than thirty days from the date of the receipt, and to pay the broker a commission "When deal is closed." When the down payment became due the purchaser, on whose behalf the broker had paid the \$200.00, informed the owner that she was unable to make the payment of a further sum, but the prospective purchaser never consummated the transaction. The court's theory was that the broker had not produced a purchaser ready, able, and willing to make the required down payment and meet the other terms of the contract or preliminary agreement and that the owner did not become liable for the commission unless the deal was closed "or unless he refused to close it with a purchaser produced by the plaintiff ready to comply with the terms of the sale."

In the absence of an express provision otherwise in a brokerage agreement upon evidence that the principal's purpose is the construction of an industrial plant and the

completion of a binding contract containing specified conditions and assurances with respect, inter alia, to certain financial arrangements required by the principal for its protection, no liability for a commission arises unless and until a contract satisfactory to the principal is actually executed or unless the broker is instrumental in producing a responsible person who is ready, able, and willing at all times to enter into a contract conforming to the terms outlined in the employment of the broker, payment of the commission, in such a case, being conditioned upon securing for the principal a binding contract and recovery of a commission being precluded where the broker does not produce a party who enters into such a contract and furnishes guaranteed notes satisfactory to the principal, pursuant to previous tentative arrangements agreed upon, but rather fails to meet the conditions, where there is no waiver of performance, even though the principal, acting upon the verbal representations of the customer, in anticipation that the contract will be consummated, incurs expense in preparation for performance of the contract. *J. P. C. Petroleum Corp. v. Vulcan Steel Tank Corp.* (1941, CA 10th Okla.) 118 F 2d 713.

8 Am. Jur. page 1084-1085. Sec. 168: To entitle a broker to his commissions, he must accomplish what he undertook to do in his contract of employment, for, as a rule, nothing short of that is sufficient to constitute a performance upon his part. He is never entitled to compensation for unsuccessful efforts. In every case reference must be had to the terms of that particular employment in order to determine whether or not a broker's duties have been performed. . . .

Page 1089. Sec. 173. . . . According to still other decisions the necessity of having the contract negotiated reduced to writing depends upon the ultimate result of the transaction. That is, the broker, at his own risk, has the option of either securing a binding written contract from his customer or of producing a person who is not only then, but at all times thereafter, ready, able, and willing to carry out the deal in hand.

Page 1092. Sec. 176. . . . In other words, if the principal does not see fit to modify his original proposals the broker can lay no claim to his commissions until he produces a person who is ready, able, and willing to accept the exact terms of his principal. This is true even though there is but a slight variance between the contract tendered by the broker and that authorized by his employer. Thus if the person produced by a broker is willing to purchase at the price set by the employer of the latter but is not willing to pay such price in the exact manner prescribed in the broker's contract of employment the latter is not entitled to his commissions.

Where, in response to an inquiry by real estate dealer, owner of realty wrote a letter stating that he would sell realty for a price stated, "terms, cash or contract," dealer had authority to sell realty by contract only upon terms to be agreed upon and which were satisfactory and acceptable to owner, and dealer was not entitled to a commission for finding a buyer on contract under terms not acceptable to or confirmed by owner.—*White v. Turner*, 192 P. 2d 200, 164 Kan. 659.

Broker who merely secures contract obligating purchaser to consummate purchase or forfeit earnest money

or partial payments is not entitled to commission. *Scott v. Kennedy*, 3 P. 2d 907, 152 Okl. 165.

Point II.

Exhibit "1" was not subscribed by either of the parties to the said proposed sale and is, therefore, void under the statute of frauds.

Defendant, in its point II, alleges that the details of the agreement between the plaintiffs and the buyers "had all been arranged and agreed upon" as evidenced by Exhibit "1." We have pointed out hereinbefore that the indisputable evidence is that Exhibit "1" was merely a preliminary memorandum of what the parties were discussing and that both of the said parties had notified Mr. Eggertsen, upon leaving his office, that nothing more should be done by way of drawing an agreement until they notified him. Furthermore, Exhibit "1" was not subscribed by anybody and it is, therefore, wholly invalid for any purpose under Section 25-5-1 Utah Code Ann. 1953 (and 33-5-1 Utah Code Ann. 1943).

The case of *LeVine v. Whitehouse*, 37 Utah 260, 109 P. 2, Ann. Cases 1912, C 407, holds that the signature of the vendor only is sufficient under this statute. In the instant case not even the vendor signed the memorandum, and the undisputed evidence is that it was never intended as anything more than some notes made by Mr. Eggertsen of a preliminary discussion of terms. It is elementary that a deficiency in a memorandum cannot be supplied by parole evidence. (49 Am. Juris. 636)

Point III.

The defendant failed to produce purchasers who were ready, willing and able at any time to purchase the said property under any terms or conditions agreeable to the plaintiffs.

Defendant relies in part upon the general allegation that the purchasers were ready, willing and able to fulfill their agreement, and that plaintiffs refused to go through with the agreement.

We again emphasize the fact that the earnest money receipt and agreement, Exhibit "A," contained absolutely no provisions as to the time or manner of the payment of the \$19,000.00 balance, and that that element of the proposed agreement, undetermined as it was, was sufficiently vital and important to render the entire agreement void and unenforceable for lack of certainty and definiteness. Admittedly the parties to the proposed sale did discuss the said terms, and the proposed buyers did suggest the transfer of their interest in some property as security for the payment of said balance, but the record is devoid of any evidence that the plaintiffs ever accepted such proposal, and in fact the said proposals were rejected as evidenced by the Notice, Exhibit "2." Under the terms of Exhibit "A" it could not be said that the plaintiffs were obligated to accept any particular part of the \$19,000.00 at any certain time nor that they would be obligated to accept any particular security for the payment of the said \$19,000.00, nor even that they would be obligated to accept the said \$19,000.00 in cash, if such a tender had been made by the buyers. Furthermore, the buyers at no time

did any more than to offer to pay the \$6,000.00, required to be paid within 60 days, and to discuss or confer concerning the payment of the balance. At no time did the said purchasers tender payment of the full balance of \$19,000.00 in cash. How can it be said that the proposed purchasers were ready, willing and able to perform when there is no determination as to what would constitute performance?

The cases hereinbefore cited under Point I apply with equal effect to Point III. We further refer to 12 A.L.R. 2d at page 1421 and pages following for additional annotations on the points herein mentioned.

It is elementary, of course, that a real estate broker is not entitled to a commission for procuring a purchaser or lessee on terms different than those agreeable or acceptable to the owner. (E. B. Wicks Co. v. Moyle, 103 Utah 554, 137 Pac. 2d 342; White v. Turner, 164 Kan. 659, 192 Pac. 2d 200).

Defendant further contends that failure to consummate the said sale was due to some failure or refusal on the part of the plaintiffs. We again submit that there is no evidence in the record of such failure or refusal. It is clear that unless the failure to secure a purchaser upon the terms proposed and within the time provided is due to the negligence, fraud or fault of the owner, a real estate broker may not recover upon his contract for commissions (Ford v. Palisades Corp. 101 C.A. 2d 491, 225 Pac. 2d 545).

Point IV.

The plaintiffs at no time accepted the said purchaser, and there was never any meeting of minds between the said purchasers and the plaintiffs as to the terms or conditions of the payment of the purchase price of the said property.

Defendant contends in his Point III that the fact that the plaintiffs and the proposed purchasers negotiated in an attempt to consummate the sale which the defendant commenced to make proves that the proposed purchaser was accepted by the plaintiffs.

We again emphasize that the only thing the defendant did was to obtain Mr. and Mrs. Johnson as prospective buyers who made a down payment of \$1,000.00, agreed to pay \$6,000.00 in 60 days and the balance of \$19,000.00 in some manner yet to be determined. Surely the fact that plaintiffs attempted to cooperate in the completion of the job that the defendant had commenced should not result in penalizing the plaintiffs to the extent of relieving the defendants of any further responsibility. The undisputed evidence is that the defendant did nothing further to consummate the transaction after obtaining Exhibit "A" other than to make some contacts in an effort to obtain the bond for the purchasers. We submit that the defendant was not entitled to wash its hands of all responsibility of completing the proposed sale simply because plaintiffs and the proposed purchasers expended some efforts of their own to assist in completing the sale.

We challenge the defendant to point to any evidence in the record which shows that the plaintiffs and Mr. and

Mrs. Johnson ever agreed upon how or when the \$19,000.00 would be paid. The citations and references hereinbefore set forth in Point I apply as well to the facts referred to in Point IV.

CONCLUSION

Plaintiffs respectfully submit that the defendant utterly failed to obtain a buyer who was ready, willing and able to purchase the property on terms acceptable to the seller; that unacceptable terms could not be imposed upon the plaintiffs so as to entitle the defendant to a commission; that the defendant wholly failed to earn any commission in the transaction, and that it would be unconscionable to permit the defendant to retain the \$1,000.00 paid to it in this transaction; and that the plaintiffs are entitled to judgment as awarded by the trial court.

Respectfully submitted,

ROMNEY & NELSON

*Attorneys for Plaintiffs
and Respondents*

212 Kearns Building
Salt Lake City, Utah