1953

George H. Patterson and Wilana C. Patterson v. James Blair and Neta Blair : Brief of Appellants

Utah Supreme Court

Claude T. Barnes; Attorney for Appellants;

Case No. 7948

IN THE SUPREME COURT
of the
STATE OF UTAH

GEORGE H. PATTERSON, Official Broker of INTERMOUNTAIN LAND AND LIVESTOCK COMPANY, and WILLANA C. PATTERSON, doing business as INTERMOUNTAIN LAND AND LIVESTOCK COMPANY,

Plaintiffs and Appellants,

vs.

JAMES BLAIR and NETA BLAIR, his wife,

Defendants and Respondents.

Case No. 7948

BRIEF OF APPELLANTS

CLAUDE T. BARNES,
Attorney for Appellants.

TABLE OF CONTENTS

TABLE OF CONTENTS

IN THE SUPREME COURT
of the
STATE OF UTAH

GEORGE H. PATTERSON, Official Broker of INTERMOUNTAIN LAND AND LIVESTOCK COMPANY, and WILLANA C. PATTERSON, doing business as INTERMOUNTAIN LAND AND LIVESTOCK COMPANY,

Plaintiffs and Appellants,

vs.

JAMES BLAIR and NETA BLAIR, his wife,

Defendants and Respondents.

Case No. 7948

BRIEF OF APPELLANTS

STATEMENT OF FACTS

Because, in offering a ranch to a customer, a real estate agent said it was a "man-killer," the owner refused to pay the agent his commission when later that very customer bought the place; and the agent brought this suit to recover it. A jury decided against the broker; and this is an appeal on the ground that, since *all* the evidence admitted that an offer was made, the court erred in overruling a motion for a new trial.

The defendants listed their ranch near Payson, Utah, for sale by the duly licensed real estate brokers and agents, the plaintiffs; the agents went to work on it, advertised it; and through the agent Eckersley, offered it to Paul Hurst, and, although the real estate men spent much time with Hurst, even taking him to Montana and Wyoming to show him other ranches, Hurst did not buy. After the listing agreement had expired, however, Hurst returned to the Blair place and bought it; and the plaintiffs sued the defendants for their commission under the saving clause of the listing agreement which allowed them their commission if within a year the ranch was sold to anyone to whom they had "offered" it.

The precise point of the case is, therefore, that the defendants agreed in writing that if they "sold or exchanged" their ranch "within 12 months after" the expiration of the listing agreement "to any person to whom" the plaintiffs had "previously OFFERED it" they would pay the real estate agent commission (Tr. page 6, line 14, et seq.). (Plaintiff's Exhibit "A").

There was no dispute at the trial to the effect that the ranch was sold by the defendants within the twelve months period to Paul Hurst to whom plaintiff's claimed that they had "previously offered it," thus entitling them to their commission.

The undisputed evidence shows:

(1) That Paul Hurst: (a) had resided in Payson 30 years (Tr. 33, line 15); (b) that he ran a store which

was listed with the plaintiffs for sale (Tr. 34, line 27, et seq.); (c) that he knew Mr. Eckersley, plaintiff's agent, had his office in Payson (Tr. 35, line 9); (d) that plaintiffs had the Blair place listed for sale (Tr. 35, line 15); (e) that plaintiff's agent told him "he had the Blair place for sale" (Tr. 35, line 23); (f) that the Blair place was "two miles north and one mile east" of where he (Hurst) lived (Tr. 33, line 28); (g) that he had been on the Blair place, assisted in threshing there and knew where the various fields on it were (Tr. 34, lines 3-18); (h) and he knew all the time that Mr. Eckersley was trying to sell him a ranch (Tr. 36, line 13); (i) that he even went to Montana and Wyoming with Eckersley who "was trying all the time, of course" to sell him a ranch (Tr. 37, line 6).

(2) Further undisputed evidence of what Hurst knew on the offer of the Blair place, we quote from the cross examination of Hurst (Tr. 37):

> "Q. Trying all the time to sell you a ranch. Now when Mr. Eckersley took you to the Blair place and told you he had that place for sale, you knew if you wanted further details, he was ready to give them to you?
>
> "A. He didn't take me to the Blair place, he was just riding by and * * *
>
> "Q. I understand. But listen. You knew that when he said, 'I have got this place for sale,' if you wanted further details, you could get them?
>
> "A. That's right.

"Q. And you knew he had it listed as he said he had?

"A. Yes, sir."

(3) Further undisputed evidence concerning the offer of the Blair place to Mr. Hurst, is the testimony of Mr. Eckersley:

> "A. I contacted Mr. Paul Hurst at his store at the time I had his listing on his store, and told him this was available. And he intimated that if I could sell the store he would like to obtain that property, or other properties that I had listed." (Tr. 19, line 15). (Mr. Hurst said that he wouldn't categorically deny that such took place. Tr. 38, line 9).)

Mr. Eckersley testified that Mr. Hurst knew the Blair place better than he did (Tr. 20, line 6), and we "did talk about values on the place." (Tr. 20, line 8); and that "if he could make the exchange of the property, Hurst store for Blair ranch, "it would be nice, if they could get together." (Tr. 20, line 17).

> "Q. Now the listing that has been alleged here is dated April 14, 1951. About what time was it after the listing that you offered this to Mr. Hurst?
>
> "A. It would be about a month I imagine, something like that." (Tr. 23, line 9).

Further concerning the offer to Mr. Hurst:

> "A. Well, I mean definitely that I told him that it was available and that it was for sale, and and much as one would to another that felt the one you were talking to knew the property really better than you did." (Tr. 24, line 6).

We call to the court's attention here that apparently the defendant's theory of the case was, that it was necessary that the agent *show* the prospective customer the place to be entitled to a commission; but the contract read "OFFERED" alone. Thus in the transcript (page 24, line 26), counsel used the words "actively show him about the property." Showing was not necessary, especially to one who had known the property for 30 years, and knew it better than the agent. The contract read: "OFFERED."

(4) Whatever were the offers made to Mr. Hurst and conversations concerning a possible exchange, at his store, which Mr. Hurst would not under oath deny (Tr. 38, line 9), there was a definite occasion when according to Mr. Hurst's own testimony there was an offer to him. We quote (Tr. 29, line 20 et seq.):

> "A. We were riding along the road, and Mr. Eckersley said, 'I have got to go in and see this man a minute about his place.' We just rode in the lane, back in where he was working; we rode back in and he talked to him.
>
> "Q. Did Mr. Eckersley say anything about the place being for sale?
>
> "A. He said, 'This place is for sale,' yes.
>
> "Q. Did he say anything about the place?
> "A. He said, 'I don't believe you want this place. It is a man-killer.' He said, 'It is killing Mr. Blair.'"

Right there—and this is the nub of the whole case—we have undisputed proof of what Mr. Hurst's reaction

was to those words, for further on (Tr. 37, line 14) he testified:

"Q. You knew that when he said, 'I have got this place for sale,' if you wanted further details, you could get them?

"A. That's right.

"Q. And you knew that he had it listed as he said he had?

"A. Yes, sir."

ARGUMENT

I.

Real estate brokers are engaged in an honorable and duly licensed business; and, especially in their efforts to sell ranches, they go to vast expense for newspaper advertising, and for trips by automobile or even airplane from ranch to ranch and state to state to please the prospective purchaser; yet so often have they brought buyer and seller together and discovered to their chagrin that the sale was not closed until after the expiration of the listing agreement, that for their own protection real estate brokers have had to insert in the listing a past-expiration clause such as the one involved herein. It is a great temptation for seller and buyer to await the expiration, and then divide the earned commission between themselves. Often the sum involved is $5,000 or more with respect to ranches; indeed, lately it has become the custom in many instances to fly the prospect

over the grazing "rights" of a ranch as well as to transport him from ranch to ranch by automobile. When a prospect declines to buy, it is distressing indeed, a few months later, to discover that he returned and closed the transaction himself, when he and the seller both felt they could ignore the expensive efforts of the real estate broker to bring them together.

The entire case must be decided on the answer to two questions: (1) did Hurst know that Eckersley had the Blair place listed for sale? and (2) did Eckersley offer it to him in such a way that Hurst knew if he was interested it was open to his further investigation? *All* of the evidence answers "yes" to both; and the evidence comes not only from the plaintiff but also from Hurst himself, who was the only witness produced by the defendants on that point. Under such circumstances the verdict was contrary to both law and the evidence; and it was error for the court not to grant a new trial.

There is nothing strange about the word "offer"; and, indeed, perhaps more often than not it is accompanied by some apparently dissuasive word.

Shakespeare (1 Hen. IV, v. 1) wrote: "We offer faire, take it advisedly."

A saleslady says: "I offer you this dress; but I'm afraid you will not like the color." It is in a way, a challenge.

A law book salesman says: "I offer you this set; but you might need an additional room to hold it." Again a challenge.

Here are a few common offers:

I OFFER YOU MARRIAGE, BUT: I realize I am unworthy of you; Your parents are wealthy and you would sacrifice too much, I fear; You are used to luxuries I cannot afford; I can see only toil ahead of us; You belong to a social stratum far beyond my reach; It will mean changing your driving from Cadillac to Ford; I belong to a despised race and the union will cause you pain; You would not want me when outstanding men adore you; Why choose me when it will break your back to help earn a living? I have served time and I see only misery for you.

I HAVE THIS FOR SALE, BUT: It is too expensive for you; You are not equipped to handle it; You would have to work night and day to make it pay.

One must understand the psychology of selling to realize that such expressions constitute a challenge; and everyone likes to feel that he has the superior abilities necessary to overcome difficulties. Indeed, such expressions are ordinarily more persuasive than glowing descriptions, for the inclination is to resist sales talk. If thus one disparage his product the listener unconsciously begins to reflect on the favorable things he knows con-

cerning it, and even to suspect that for some reason the seller discourages the offer that he might sell to another.

Since *all* of the evidence was clear to the effect that Eckersley did "offer" the ranch to Hurst, and Hurst knew he was being "offered" it, the verdict was clearly against the law and the evidence, and the trial court should have granted a new trial.

In this case the defendants left the state when they learned they were about to be sued, probably unaware that a writ of garnishment could return them to the jurisdiction of the court. Only thus were they compelled to face the well-earned compensation due the plaintiffs.

Respectfully submitted,

CLAUDE T. BARNES,
Attorney for Appellants.

cerning it, and even to suspect that for some reason the seller discourages the offer that he might sell to another.

Since *all* of the evidence was clear to the effect that Eckersley did "offer" the ranch to Hurst, and Hurst knew he was being "offered" it, the verdict was clearly against the law and the evidence, and the trial court should have granted a new trial.

In this case the defendants left the state when they learned they were about to be sued, probably unaware that a writ of garnishment could return them to the jurisdiction of the court. Only thus were they compelled to face the well-earned compensation due the plaintiffs.

Respectfully submitted,

CLAUDE T. BARNES,
Attorney for Appellants.