

1980

Global Recreation,, Inc., A Utah Corporation, Dba  
Global Enterprises And Associates, Eldon P.  
Hendricks And Stan Snarr v. Cedar Hills  
Development Company, A Partnership Consisting  
of Associated Industrial Developers, Inc., A  
California Corporation, And Near East  
Technological Services, Inc., A California  
Corporation : Appellants' Brief

Utah Supreme Court

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IN THE SUPREME COURT  
STATE OF UTAH

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GLOBAL RECREATION, INC., a Utah :  
Corporation, dba GLOBAL ENTER- :  
PRISES AND ASSOCIATES, ELDON :  
MENDRICKS and STAN SNARR, :

Respondents, :

-vs- :

Case

NEAR HILLS DEVELOPMENT COMPANY, :  
Partnership consisting of :  
ASSOCIATED INDUSTRIAL DEVELOPERS :  
, a California corporation, :  
NEAR EAST TECHNOLOGICAL :  
SERVICES, INC., a California :  
Corporation, :

Appellants.

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APPELLANTS

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IN THE SUPREME COURT  
STATE OF UTAH

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GLOBAL RECREATION, INC., a Utah :  
Corporation, dba GLOBAL ENTER- :  
PRISES AND ASSOCIATES, ELDON :  
P. HENDRICKS and STAN SNARR,

Respondents, :

-vs-

:

Case No. 16685

CEDAR HILLS DEVELOPMENT COMPANY, :  
a partnership consisting of  
ASSOCIATED INDUSTRIAL DEVELOPERS :  
INC., a California corporation,  
and NEAR EAST TECHNOLOGICAL :  
SERVICES, INC., a California  
corporation, :

Appellants. :

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APPELLANTS' BRIEF

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GLOBAL RECREATION, INC., a Utah :  
Corporation, dba GLOBAL ENTER- :  
PRISES AND ASSOCIATES, ELDON :  
P. HENDRICKS and STAN SNARR,

Respondents, :

-vs-

Case No. 16685

CEDAR HILLS DEVELOPMENT COMPANY, :  
a partnership consisting of  
ASSOCIATED INDUSTRIAL DEVELOPERS :  
INC., a California corporation,  
and NEAR EAST TECHNOLOGICAL :  
SERVICES, INC., a California  
corporation, :

Appellants. :

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APPELLANTS' BRIEF

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NATURE OF THE CASE

Plaintiffs claim defendants have breached a contract whereby commissions are due for the sale of real property. Defendants counterclaimed for a portion of the commissions that had been paid alleging that plaintiffs were not licensed as required by Utah Statutes.

DISPOSITION IN LOWER COURT

This matter was tried to the Court. Plaintiffs were given judgment on their Amended Complaint and defendants' Counterclaim was dismissed.

RELIEF SOUGHT ON APPEAL

Defendants seek to have this Court exercise its supervisory

equitable jurisdiction; review the record; reverse the trial court and enter judgment in favor of defendants on their Counterclaim, or, in the alternative, to reverse and remand to the trial court for further appropriate proceedings.

#### STATEMENT OF FACTS

Plaintiff Global Recreation, Inc., a Utah corporation, GRI subsequently known as Global Recreation, Inc., a Utah Corporation dba Global Enterprises and Associates, and generally referred to at the trial as "Global" was a marketing firm who entered into an exclusive marketing agreement with Associated Industrial Developers, commonly referred to as "AID". The date of the marketing agreement was September 28, 1976 (Exhibit 1). Subsequent to the time the agreement was entered into, AID, owner and developer of property in Utah County, associated itself with a partner, Near East Technological Services, Inc., a California corporation, and commenced doing business under the name of Cedar Hills Development Company, a partnership. The defendant in this matter is commonly referred to as Cedar Hills, however, this results in some confusion because the property that the developer/owner had agreed to market through the plaintiffs consisted of several hundred acres in the north part of Utah County, which is known as the Town of Cedar Hills. Eldon P. Hendricks is named as a plaintiff and was a properly licensed real estate broker who associated himself with Global Enterprises on April 13, 1977 (See answer to defendants' interrogatories, question No. 6). Mr. Hendricks was not in attendance at the trial and did not testify in the matter. Plaintiff Stan Snarr was added as a party to the action after the original Complaint had been filed. Mr. Snarr was

never licensed as a real estate broker but only as a real estate salesman. His employment with Global commenced May 14, 1976 (Answer to defendants' interrogatories Nos. 2 and 6, R. 60, 61).

Pursuant to the marketing agreement and in answer to defendants' interrogatories, plaintiffs admitted that they had been paid total commissions in the amount of \$79,127.20. Of this total amount, the sum of \$33,945 was paid from the period of November 24, 1976 through April 8, 1977. This amount becomes significant because it was during that period of time which the defendants alleged that the plaintiffs did not have a licensed real estate broker associated with them. Prior to the time of trial, the parties, through stipulation and settlement, agreed on the amount of the commissions after the date of April 15, 1977 for which plaintiffs were suing. The issues then at trial, were whether or not plaintiffs were entitled to commissions on the Wincor transaction and whether defendants were entitled to relief sought in their Counterclaim.

The Wincor transaction involved an earnest money agreement entered into on November 19, 1976 (Exhibit 4) which ultimately closed on a uniform real estate contract at a later date and upon which plaintiffs were paid a partial commission. However, because of lack of improvements which had been a part of the transaction, the uniform real estate contract was terminated and the property was never conveyed by Cedar Hills Development, and no interest in the property is claimed by Wincor (T. 71).

In plaintiffs' memorandum of law, dated November 15, 1978 and filed November 17, 1978, it is admitted that plaintiff GRI had



failed to associate itself with a broker prior to April 15, 1977 (R.29). However, at the time of trial, there was some confusion in the evidence as to whether or not the plaintiffs were the employees of AID which had a properly licensed broker by the name of Jerald Richardson (Exhibit 2). This confusion is compounded by reason of the fact that Mr. Richardson was also the party representing AID who signed as the owner of the property in the listing agreement (Exhibit 1). When sales were made by the plaintiffs and commission checks were paid, they were drawn on the Cedar Hills Development Company account and were made directly to Global Recreation or Global Enterprises for the full amount of the commission (See defendants' Exhibits 6, 7, 8, 9, and 10). Mr. Richardson testified that at the time he signed the marketing agreement and the earnest money contracts and the commission checks, that he did so as a property owner and not as a real estate broker (T. 55, 57, 60, and Exhibit 2). Plaintiff Stan Snarr testified that he never received any payments directly from AID but was paid a salary from Global (T. 28).

#### ARGUMENT I

TO RECOVER REAL ESTATE COMMISSIONS, THE PLAINTIFF MUST ALLEGE AND PROVE COMPLIANCE WITH THE LICENSING STATUTES OF UTAH.

Utah Code Annotated, 1953 as amended, 61-2-1, provides:

"It shall be unlawful for any person, co-partnership, or corporation to engage in the business, act in the capacity of, advertise or assume to act as a real estate broker or a real estate salesman within this state without first obtaining a license under the provisions of this chapter."

Section 2 of that same chapter then proceeds to define real

estate broker:

"The term real estate broker within the meaning of this chapter shall include all persons, . . . corporations, who for another and for a fee, commission or other valuable consideration. . . sells. . . or lists. . . any real estate."

Plaintiffs, in making reference to the marketing agreement designated as Exhibit 1, state:

"At the time said contract was signed, the plaintiff Global Recreation, Inc., had as employees, several licensed real estate agents, but had failed to associate itself with a licensed broker." (See memorandum of law dated November 15, 1978 and filed November 17, 1978).

By its own terms, the marketing agreement between the parties placed the responsibility for all necessary licensing upon Global (Exhibit 1, page 2, "best efforts" clause); it was further agreed in the "laws of Utah" clause, that the laws of the State of Utah would govern the transaction (Exhibit 1, page 3). Therefore, defendants claim, based on the contract for commissions due for services rendered under the agreement, should be resolved through reference to Utah Code Annotated, Section 61-2-1 through 22. These sections of the Code were ignored by the trial court in its decision.

Utah Code Annotated Section 61-2-18(a) denies standing to anyone other than a real estate broker, duly licensed at the time of the services resulting in the real estate sale to bring or maintain an action in any court of the State.

The only issue on the plaintiffs' Amended Complaint at the time of the trial was the Wincor transaction for which plaintiffs claimed a balance of \$10,700 was still due (the sum of \$10,200 as part of that Wincor commission had been paid to the plaintiffs on

November 24, 1976). Defendants argue that at the time of the Wincor transaction neither Mr. Snarr nor Global Recreation was a licensed real estate broker and that plaintiff Eldon Hendricks had not at that time become associated with Global and therefore, the plaintiffs were precluded by statute from bringing this action. Further, defendants contend that plaintiff Stan Snarr never has been a licensed real estate broker and has never claimed to be licensed as a real estate broker and therefore, has no standing as a plaintiff in this action. Defendants argue that the plaintiffs first violated the licensing requirements of the Utah Code at the time they entered into the marketing agreement to market the real property owned by Cedar Hills and further violations occurred with concerted actions by Global salesmen leading to unlawfully consummated transactions including the Wincor sale.

Plaintiffs argued at the time of trial that since the owner/representative of Cedar Hills, Mr. Jerald Richardson, was also a licensed broker when he contracted with Global for their services, they were in compliance with the licensing requirements and entitled to bring suit for recovery of commissions. However, by his own trial testimony, (though admittedly confusing), Mr. Richardson's answer contradicts this reasoning. While being examined and cross examined by both counsel, Mr. Richardson stated: (1) the marketing agreement was signed in his capacity as principal in the company of Associated Industrial Developers totally independent of his incidental qualification as a licensed broker (R. 55); (2) Mr. Richardson paid nothing to Global as a broker but only as an owner/representative (T. 58 and 59); (3) the customary

broker-salesmen commission split arrangement did not exist between Richardson and Global, but such splitting was done between Global and its salesmen (T.59); (4) Mr. Richardson authorized all checks as a property owner or as a principal for AID (T. 60, 61, and 64); (5) the Wincor earnest money agreement (Exhibit 4) was authorized and signed by Richardson as owner/representative and not as a licensed broker for Global (T. 66).

Utah Code Annotated, 61-2-10, restricts the procedure for payment of commission to salesmen, making it unlawful for salesmen to accept consideration for sales efforts from anyone other than "his employer, who must be a licensed real estate broker". Mr. Richardson admits he made no payments to Global salesmen, though they later allege him to be their licensed broker, nor did he sign payments check as a broker, but rather as as owner/representative of AID. Nevertheless, it is a fact that the salesmen were compensated by salary or commissions from their employer, Global Recreation, Inc. Not only does the testimony show that Mr. Richardson did not act as a broker for Global, but also of every greater significance, he was not named as one of the plaintiffs in the action brought by Global. If, in fact, Mr. Richardson was the broker for Global, he would need to have been one of the plaintiffs bringing the action as required by Utah Code Annotated, 61-2-18.

In Morris vs. John Price Associates, Inc., 590 P.2d 315, (Utah 1979), this Court held that plaintiff Mr. Morris was an improper party to an action to collect a real estate commission. Mr. Morris was a licensed real estate salesman but not a licensed

broker as defined and required under Utah Code.

In Diversified General Corp., vs. White Barn Golf Course, Inc., 584 P.2d 849, (Utah 1978), a case dealing with the interpretation of Utah Code Annotated, 61-2-1 and 18, a corporate plaintiff was denied recovery of commissions claimed pursuant to a "finders agreement". This Court affirmed the trial court's summary judgment against the plaintiff based upon a violation of the statute in performing real estate broker's services without the required license.

In a recent contractor's licensing action, Meridian Corporation vs. McGlynn/Garmaker Company, 567 P.2d 1110 (Utah 1977), the plaintiff attempted to recover on a construction contract though he was unlicensed in Utah as a contractor. The Court cited Olsen vs. Reece, 144 Utah 411, 200 P.2d 733 (1948) finding the contractor in violation of a Utah regulatory statute, and therefore, barred from recovery. It reaffirmed the principle recognized in Olsen whereby licensing provisions are placed into two categories. First, for the purpose of regulation and protection of the public and second, for purpose of revenue. In the first situation, contracts made by unlicensed persons are void. In the second situation, contracts made by unlicensed persons are avoidable. The Court, in Meridian, held that the contract was void and stated that the statute had been passed for the public's protection. Real estate licensing statutes, too, are intended to protect the public from irresponsible realtors (See Andersen vs. Johnson, 160 P.2d 725 (Utah 1945)).

Plaintiffs, in violation of these "regulatory laws" are required to allege and prove their proper licensing in order to

state a cause of action. Smith vs. American Packing and Provisions Company, 102 Utah 351, 130 P.2d 951. The Smith court refused to overturn the Olsen decision and reaffirmed these "principles of law. . . to be the laws of this state." The same principles are cited in a well driller case, which turned upon the required license issue. Mosely vs. Johnson, 22 Utah 2d 348, 453 P.2d 149 (1969). This Court held that the statute requiring drillers to secure a license was designed to protect the people of the state. Anyone drilling a well without this license could not recover for services, either on the contract or on a theory of quantum meruit.

In 27 Am Jur 2d, Section 117, Equity, it states:

"A court of equity has no more right than has a court of law to act on its own notion of what is right in a particular case; it must be guided by the established rules and precedents. . . it is its duty to follow these principles which have been established by precedent . . . a court of equity is never required or justified in rendering an equitable decision or decree or in aiding the accomplishment of that which is a violation of law or public policy. . . where rights are defined or established by existing legal principles, they may not be changed or unsettled in equity. A court of equity may not create rights not previously existing at law . . . "

Defendants contend that the trial court in the present case committed error in allowing recovery on equitable principles and contrary to the precedent of the above referred to cases and the above referred to statutes. The Mosley rationale for denying equitable recovery was stated as:

"that to allow one to evade the law and recover for work which he is forbidden to pursue flies in the face of the statutory intent." (453, P.2d 153)

When an agreement is negotiated by one required by statute to maintain a license, the right to equitable recovery based on

performance depends upon the purpose of the licensing statute. If legislative intent is to protect the public from fraud, misrepresentation and dishonest and incompetent persons, all agreements made by such unlicensed parties are held illegal, void and unenforceable. The wrongdoer is denied any recovery for services rendered, either based on the contract or an equitable theory of quantum meruit. Conversely, when the legislature intended the statute for revenue purposes, then substantial performance could render the agreement enforceable through equity. However, under the present fact situation before the Court, the intent of the real estate statute as announced by this Court in Anderson, supra,, is that the law is enacted for the regulation and registration of those engaged in real estate broker transactions and it is not created to raise revenue.

The trial court held that the defendants ratified an otherwise void agreement through their continual performance of agreement obligations. The Second Restatement of Contract Law, Section 13(a) declares that:

"A void agreement or promise is no contract at law and it is void of legal effect. This is not to be confused with a voidable agreement which acknowledges the validity of the transaction but reserves to one or both parties the right to avoid the obligations of the agreement. Voidable agreements, unlike a void agreement, are subject to a ratification which terminate the parties rights of avoidance. A party to a voidable agreement, may by his words or acts, resurrect and bind himself to his obligations under the agreement."

In 17 Am Jur 2d, Section 7, Contracts, it states:

"A void contract is no contract at all; it binds no one and is a mere nullity. . .an action cannot be maintained for damages for its breach."

Defendants argue that the trial court erred in finding an acquiescence through past payments under the marketing agreement. It has been held that payment for services rendered under a void agreement is insufficient to ratify the contract. See Milford vs. Milford Water Company, 124 Pa 610, 17A, 185.

#### ARGUMENT II

THE TRIAL COURT FAILED TO MAKE FINDINGS OF FACT WHICH WERE ESSENTIAL TO PLAINTIFFS' RECOVERY.

The trial court failed to consider the unlawful actions of Global. It overlooked the legal principles which should have rendered plaintiffs unable to bring this action. Therefore, the court erred in giving judgment to the plaintiff on unspecified equitable grounds, without first resolving these facts as they relate to the law. A trial court's power to decide a case in law or in equity is not argued, but a court may not disregard clearly applicable legal precedents in deciding intuitively what is right in a particular action. The trial court said:

". . . the court. . . does not deem it necessary to decide the case upon legal principles of law but will do so on equitable principles." (See Memorandum Decision R. 90)

A court may not waive its imaginative equitable wand and cause the disappearance of precedent and statutory regulations which both the Utah Legislature and the Utah Supreme Court have endeavored to preserve as a protection to the public. Questions are not to be decided on the basis of "raw equity" when such relief blatantly defies legal principles and precedents in conflict thereof. See Empire Engineering Corporation vs. Mack, 217 NY 85, 11 NE 475.



In its memorandum decision, the trial court acknowledged confusion as to the relationship of the parties. It was the court's responsibility to sort out the confusion and clarify the status of the parties as defined by law. This duty was not carried out. The existence of a legally recognized relationship is germane to any decision based on the real estate licensing statutes. The plaintiff's burden has been clearly defined as "alleging and proving it was duly licensed as a real estate broker at the time the cause of action arose." This issue has not yet been decided. Only a licensed broker is recognized by statute as having sufficient personal standing to bring such an action.

Part of the dispute at the time of trial was whether the Wincor transaction had ever been completed and closed (See Exhibit 2). Evidence was introduced to show that the obligation of the vendor in completing the improvements that were part of the transaction were never made. Wincor never possessed the property and received the return of all funds they had paid and the property continues to the present in the ownership of Cedar Hills. On the other hand, plaintiffs contend that the transaction was closed by reason of the fact that a uniform real estate contract was entered into and a partial commission paid on November 24, 1976. In its memorandum decision, the court states that the plaintiffs are entitled to judgment in the amount of \$6,780 "if in fact the sale upon which the commission is claimed is completed and the transaction closed." The court circumvented its responsibility in making a finding of fact on this disputed matter. It remains to the present time, the contention of the defendants, that the transaction was never fully completed and therefore,

there would be no liability for the commission as ordered by the court.

### ARGUMENT III

DEFENDANTS' COUNTERCLAIM FOR A SUM OF ONE TO THREE TIMES THE AMOUNT OF COMMISSION PAID AT THE TIME THE PLAINTIFFS WERE UNLICENSED SHOULD BE GRANTED.

Utah Code Annotated, 61-2-17(b) reads:


"In case any person. . . or corporation shall have received any sum of money. . . as commission. . . by or in consequence of his violation of any provision of this act, such person . . . or corporation shall also be liable to a penalty of not less than the amount of the sum of money so received and not more than three times the sum so received, as may be determined by the court, which penalty may be sued for and recovered by any person aggrieved and for his use and benefit, in any court of competent jurisdiction."

The sum of \$33,945 was paid by the defendants to the plaintiffs at a time when there was no licensed broker associated with the plaintiffs (See defendants' exhibits 6, 7, 8, 9, and 10; also answers to defendants' interrogatories). To allow plaintiffs to avoid any such penalty would be circumventing the intent of the Legislature.

### SUMMARY

Plaintiffs have, in numerous instances, violated Utah law regulating real estate licensing. The plaintiffs are not entitled to collect the commission on the Wincor transaction because of such violation and further because of the fact that the transaction was never closed. The sum of \$101,835, three times \$33,945, which was paid by the defendants during a time when the plaintiffs were not licensed, should be imposed in the form of a penalty against the plaintiffs.

DATED this 8th day of January, 1980.

  
JERRIL B. WILSON  
Attorney for Defendant/Appellants  
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MAILING CERTIFICATE

I hereby certify that I ~~mailed~~<sup>delivered</sup> a copy of the foregoing to H. Grant Ivins, Attorney for Plaintiffs/Respondents, 75 North Center, American Fork, Utah, 84003, postage prepaid this 9 day of January, 1980.

