

1980

Kenneth K. Bradford and Tammy Bradford v.
Michael Alvey and Vaughn Alvey, D/B/A C.
Howard Alvey & Sons, A Partnership; and Michael
E. Crowley, A General Partner, D/B/A Micro
Investment : Reply Brief of the Appellant

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

KENNETH K. BRADFORD and
TAMMY BRADFORD, His Wife,

Plaintiffs-
Appellants,

vs.

MICHAEL ALVEY and
VAUGHN ALVEY, d/b/a
C. HOWARD ALVEY & SONS,
a Partnership; and
MICHAEL E. CROWLEY, a
General Partner, d/b/a
MICRO INVESTMENT, a Utah
Limited Partnership,

Defendants-
Respondents.

Case No. 16829

APPELLANTS' REPLY BRIEF

Appeal from the Judgment in the Third Judicial
District Court of Salt Lake County, State of Utah

Honorable Dean E. Conder, Judge

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FILE

SEP 8 1980

Clerk, Supreme Court, Utah

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C. HOWARD ALVEY & SONS,	:	
a Partnership; and	:	
MICHAEL E. CROWLEY, a	:	
General Partner, d/b/a	:	
MICRO INVESTMENT, a Utah	:	
Limited Partnership,	:	
	:	
Defendants-	:	
Respondents.	:	

APPELLANTS' REPLY BRIEF

The Plaintiffs-Appellants, Kenneth K. Bradford and Tammy Bradford, respectfully submit the following Reply Brief in response to the Briefs of Respondents, Michael E. Crowley, Micro-Investment, and Michael Alvey and Vaughn Alvey, filed on or about the 12th day of May, 1980.

ARGUMENT

POINT I

BRADFORDS ARE ENTITLED TO SPECIFIC PERFORMANCE.

- A. At all pertinent times, Bradfords were ready, willing and able to perform.

There was no finding, express or implied, made by the lower court on this point. The evidence, however, shows that Mr. and Mrs. Bradford were ready, willing and able to perform.

In October, 1978, Mr. and Mrs. Bradford sold a duplex they owned and had been living in since prior to the execution of the subject Earnest Money Receipt and Offer to Purchase, Exhibit "1." They were paid \$15,000 down and carried the balance on contract, which contract they still hold. (R. 406, 407) From working closely with Barney Alvey and Pam Tazzer, the Bradfords realized it would be a while before their home at Shiloh was finished. Not wanting to lose money paying rent, they chose to purchase another home located at 902 Potomac, Salt Lake City, Utah. This was also in October, 1978. (R. 387)

In March of 1979, pursuant to instructions from Barney Alvey, the Bradfords sold their home on Potomac, anticipating the closing on the Shiloh home. (R. 386) To expedite preparations for the anticipated closing, which Barney Alvey represented would be "within thirty days" (first part of April, 1979) (R. 386), Bradfords rushed this sale. They received only \$500.00 down with the balance (\$15,600.00) carried by a second trust deed note on the premises. (R. 407)

Bradfords then proceeded to apply with Mason-McDuffie for an FHA loan. In all likelihood, this would have resulted in a loan commitment. Unfortunately, because the home was

not sufficiently completed to satisfy the applicable FHA regulations, the application could not be processed. (R. 345)

Bradfords could have sold the contract they are holding on the duplex and the second trust deed note on the Potomac home to obtain the monies for the downpayment and closing costs. Instead, they elected to use the \$17,000.00 which Mr. Bradford's parents agreed to give them. They, at all times, had the means to conclude the transaction. They could not be expected to obtain and maintain a firm loan commitment when it was uncertain when the home would be completed.

B. Even if it were erroneously found that the Bradfords were not ready and able to perform, such performance was prevented by Respondents, and Bradfords, were, therefore, excused.

It is a principle so widely accepted as to need no citation that performance is excused if such is prevented by the opposing party. Bradfords were always ready, willing and able to perform. They did not have a firm FHA loan commitment. If the home had been completed, there is little room to doubt that an FHA commitment would have issued. Thus, Respondents failing to complete the home prevented Bradfords from obtaining an FHA loan commitment. Bradfords were consequently excused from the necessity of showing their ability to perform.

C. This case should be remanded for hearing on this issue.

Should this Court deem the issue of Bradfords being "ready, willing and able" to perform determinative herein, it must remand the case for a finding on this point. It is not

a function of the appellate court to make findings of fact. Rucker v. Dalton, 589 P.2d 1336 (Utah 1979); Utah Rules of Civil Procedure, Rule 76(a).

Further, a failure to enter findings on material issues is ordinarily prejudicial error. Such requires that the lower court's judgment be vacated. Anderson v. Utah County Board of County Commissioners, 589 P.2d 1214 (Utah 1979); Duncan v. Hemmelwright, 112 Utah 262, 186 P.2d 965 (1947); and O'Gorman v. Utah Realty & Construction Co., 102 Utah 523, 129 P.2d 981 (1942).

POINT II

RESPONDANTS ALVEYS ARGUMENT CONTAINED ON PAGE 11 OF THEIR BRIEF IS NONSENSICAL.

Respondents Alveys allege on page 11 of their brief that the judgment of the lower court should be affirmed as there are grounds upon which the judgment can be affirmed which are not urged on appeal as being in error. They then set forth that there were three issues at trial: (1) did Bradfords obtain FHA financing?; (2) did Bradfords obtain financing within a reasonable time?; and (3) did Bradfords use reasonable diligence in seeking financing?

The issue of whether Mr. and Mrs. Bradford used reasonable diligence, under the facts and circumstances of this case, in pursuing financing, encompasses all of the above. All these items have, therefore, been effectively raised in this appeal.

POINT III

TESTIMONY OF STATEMENTS MADE TO BRADFORDS BY
MICHAEL HERZOG SHOULD HAVE BEEN ADMITTED.

- A. Michael Herzog was Respondents Alveys agent for purposes of this transaction.

Respondent Crowley's brief on page 16 cites two cases for authority that a realtor is the agent of the purchaser. These cases are easily distinguishable from the instant case.

In Duffy v. Setchell, 38 Ill. App. 3d 146, 347 N.E. 2d 218 (1976), the Seller had an exclusive listing with Realtor "A" for certain farmland. Buyer contacted Realtor "B" and asked him to approach Seller about the farmland. Realtor "B" had no prior dealings with Seller. Realtor "B" approached Seller on several occasions but never disclosed to Seller that he was representing Buyer. Realtor "B" did as Buyer requested and finally negotiated a sale to Buyer at a price less than Seller was asking and less than the top figure Buyer was willing to pay. Realtor "A" sued Seller for its commission.

There were other issues, but the above is sufficient to show why the court in that case found Realtor "B" to be Buyer's agent. Realtor "B" was not the realtor hired by Seller to market the property. Realtor "B" was retained by Buyer independently of and without Seller's knowledge. He was more than a mere middleman as he actively pursued the interest of the client (Buyer) who had retained him. Clearly, in this situation, he was the Buyer's agent.

Baskin V. Dam, 4 Conn. Cir. 702, 239 A.2d 549 (1967) is very similar to Duffy. In this case, the Buyer hired the Realtor to find and negotiate the purchase of a building lot in a given area. The Realtor found a parcel which was owned by A, told Buyer that it owned the parcel and agreed to sell it to Buyer for \$6,400.00. Thereafter, Realtor purchased the parcel from A for \$5,000.00, sold it to B for \$6,700.00, and attempted to rescind its agreement with Buyer. Buyer sued for breach of fiduciary duty of its agent-Realtor. Realtor countered that it was not Buyer's agent, but agent for the Seller A. This was rejected by the court, which found Realtor to be, under these facts, Buyer's agent.

The case at bar is so clearly different as to require no additional comment.

Also, the case of Denver Decorators, Inc. v. Twin Teepee Lodge, Inc., 431 P.2d 8 (Colo. 1967) is easily distinguishable from the cases holding that an agency relationship exists between the seller and the realtor. Denver Decorators involves an action by decorators to enforce a mechanic's lien. The court upheld a refusal by the lower court to allow a witness for appellants therein to testify as to a conversation he claimed to have had with a representative of a realty company. There was not only an "insufficient showing of any agency relationship between the realtor and respondent," there was no showing of any relationship whatsoever. Also, there was no proffer made as to an agency relationship.

In the present case, it was expressly presented that the realtor-Midvalley (Herzog) was the agent of seller-Alveys. First, there was an agreement between sellers-Alveys and Midvalley for the marketing of the subject subdivision including Lot 95. Second, sellers-Alveys were also the President and Vice President of Midvalley. Third, the offices of sellers-Alveys and realtor-Midvalley were in the same building in close proximity to each other. And fourth, sellers-Alveys expressly told the real estate agent working with Midvalley, M. Herzog, to discuss financing with the buyers-Bradfords. (Appellants' Brief p. 18)

The cases cited in Appellants' brief at pages 18 and 19 involve negotiations for sale between realtors hired by the sellers and potential buyers, and are more clearly applicable hereto than the aforementioned cases cited by Respondents. Also, see Zwick v. United Farm Agency, Inc., 556 P.2d 508 (Wyo. 1976) in which the Wyoming court at page 511 stated, "A broker [realtor] is an agent of his principal [referring to seller] which relationship we have defined as one of representation by one for another in contractual negotiations or transactions akin thereto."

Under similar facts to the present case, the Washington court held that the defendant-seller knew the realtor and permitted him to find and negotiate with the plaintiff-buyer's realtor for the sale of land. The seller's realtor was held

to be his agent for purposes of the negotiations. Alexander Myers & Co., Inc. v. Hopke, 88 Wash. 2d 449, 565 P.2d 80 (1977).
B. Proffer was not necessary.

Citing Rule 5 of the Utah Rules of Evidence, this Court in Downey State Bank v. Major Blackney Corp., 578 P.2d 1286 at 1288 (Utah 1978), stated, "A judgment will not be reversed for an alleged error unless it appears in the record that the error was prejudicial." If the error is otherwise clear, no formal proffer should have to be made.

The record clearly establishes that Michael Herzog was the agent for Respondents Alveys. That the exclusion of his statements was prejudicial is also clear. The ultimate issue is why Mr. and Mrs. Bradford did not take more steps to obtain a firm loan commitment. The excluded conversations between Bradfords and Herzog clearly go to this issue. (See Appellants' Brief pp. 16, 17; R. 372, 373, 375.) Mr. Bradford was not allowed to testify as to what Mr. Herzog told him about "obtaining financing, FHA." Nor was he allowed to testify as to why he never received a loan commitment.

Again, finding an agency relation between Herzog and Alveys was essential. This was clearly rejected by the lower court. Any proffer would have been in vain and unavailing.

CONCLUSION

Bradfords have been, except for Respondents' hindrance of not providing a nearly completed home, ready, willing and

able to perform. They are entitled to specific performance. As agent for Respondents Alveys, Michael Herzog's statements to Mr. and Mrs. Bradford concerning financing should have been admissible. Proffer was unnecessary as the court rejected all evidence, the admissibility of which depended upon the finding of such an agency relationship.

Respectfully submitted this 27 day of August, 1980.

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MAILING CERTIFICATE

Mailed a copy of the foregoing APPELLANTS' REPLY
BRIEF to Ronald L. Poulton, 9 Exchange Place, Suite 420,
Salt Lake City, Utah 84111, and to Randall S. Feil, 2000
Beneficial Life Tower, Salt Lake City, Utah 84111, this 27th
day of August, 1980, postage prepaid.

James A. Hunt