

1954

# Scott Anderson et al v. W. Adrian Wright et al : Brief of Respondents

Utah Supreme Court

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J. Reed Tuft; Bruce S. Jenkins; Counsel for Respondents;

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# In the Supreme Court of the State of Utah

SCOTT ANDERSON, FRED H. SHEP-  
ARD, EARL M. BAKER, RICH-  
ARD W. TIPPITTS, and EARL J.  
KNUDSON,

*Plaintiffs and Appellants,*

vs.

W. ADRIAN WRIGHT and W.  
MEEKS WIRTHLIN, partners, do-  
ing business under the names and  
style of WRIGHT - WIRTHLIN  
REALTORS,

*Defendants and Respondents.*

FILED

MAY 22 1954

Clerk, Supreme Court, Utah

Case No. 8140

## BRIEF OF RESPONDENTS

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## BRIEF OF RESPONDENTS

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### PRELIMINARY STATEMENT

Throughout this brief, plaintiffs and appellants will be referred to as plaintiffs, defendants and respondents will be referred to as defendants. All italics are ours.

### STATEMENT OF FACTS

December, 1953, plaintiffs commenced a consolidated action against defendants. In such action plaintiffs individually

prayed judgment against defendants for amounts claimed to be due from defendants under similar oral contracts (R. 1). The total amount demanded was \$16,375.35. At trial, it appearing to the court that the claims asserted were clearly unsupported in the evidence, plaintiffs were allowed to file an amended complaint wherein it was alleged that plaintiffs undertook to sell certain houses in a subdivision of Salt Lake County known as Morningside Heights; that the commission per house sold was to be \$100.00; that certain houses were sold; that certain amounts remain unpaid; that such amounts are presently due and owing from defendants to plaintiffs (R. 5).

The jury found for plaintiffs on the amended complaint (R. 230). After judgment and on motion of defendants, the trial court granted defendants' motion for a directed verdict (theretofore made and taken under advisement) and entered judgment for defendants notwithstanding the verdict (R. 232 and 237). The trial court's action was bottomed on the insufficiency of the evidence to support a present contractual duty in defendants to pay plaintiffs the monies demanded in the amended complaint. The *sole* question for determination on appeal is the sufficiency or insufficiency of the evidence to support the verdict of the jury.

In 1950, Felt Syndicate, a corporation, was engaged in the development of a Salt Lake County subdivision known as Morningside Heights. It was the sponsor of the development and the seller of the lots and homes making up the subdivision. Defendants, after a considerable expenditure of time and effort, entered into an arrangement with Felt Syndicate to exclusively broker for Felt Syndicate the sale of one hundred

lots and unbuilt houses in the development at a commission of \$300.00 per house (Exhibit 4). In April or May of 1950 opportunity to assist in this enterprise was extended by defendants to the plaintiffs and others as members of defendants' sales force (R. 89, 111). Defendants and plaintiffs entered into an arrangement wherein plaintiffs, among others, were given an opportunity to sell or take orders for certain lots and unbuilt homes in Morningside Heights. The proposed compensation to plaintiffs per unbuilt house and lot sold was to be \$100.00 (R. 111, R. 112). Neither the defendants as the broker nor the salesmen were to receive from Felt Syndicate, the seller, any monies at the time an order was taken or a house was sold (R. 50, 52, 122). Commissions earned were to be paid over by Felt Syndicate, the seller, on a deferred basis at certain designated times corresponding to the times when the houses being built had reached certain designated stages of completion. Commissions were to be paid over by the seller through its disbursal agent to the broker, Wright-Wirthlin, who upon receipt of the monies from the seller would in turn disburse to the salesmen their proportionate share of the commissions earned (R. 70, 112, 161, 183, 202-203, 207, 208). For ease of bookkeeping the broker and plaintiffs agreed that the broker would accumulate the monies received from the seller until such time as the broker had received sufficient monies from the seller to disburse to the plaintiffs amounts equal to 25 per cent of \$100 (R. 55-56; 208, 209).

Plaintiffs and additional members of defendants' sales force took orders for and sold all of the lots and unbuilt houses in Felt Syndicate's development. Felt Syndicate, the

seller, through its disbursal agent intermittently paid over to the broker, Wright-Wirthlin, monies aggregating \$12,790.74. Out of the amount thus received, defendant brokerage disbursed to plaintiffs their proportionate share, in the amounts and at the times as set forth in Exhibit 3. Felt Syndicate in addition to the monies paid to defendant brokerage, assigned to defendants twelve lot options of the reasonable value of \$1800.00. In return defendant brokerage extinguished \$1800.00 of the amount due from Felt Syndicate on the total commissions and immediately disbursed to plaintiffs cash equal to their proportionate share of said credit. Total credits and monies received from Felt Syndicate aggregate \$14,590.74 out of which as set forth in Exhibit 3 plaintiffs have received slightly more than their proportionate share.

There remains unpaid by Felt Syndicate the sum of \$15,409.26 out of which if and when received by defendants, defendants will pay over to plaintiffs their proportionate share according to the terms and conditions of their sales arrangement.

There is no question that a sales arrangement was entered into between plaintiffs and defendants (R. 111, 112). The problem is as to the duty on the part of defendants to presently pay over to plaintiffs the amounts demanded in the amended complaint. The court ably instructed the jury as follows in pointing up that matter:

“ . . . Now the parties have stipulated that such a contract was entered into. There is however, left and in dispute the terms and conditions under which these commissions were to be paid and the question of *whether or not there are any commissions now due and owing to these plaintiffs from these defendants . . .*

“ \* \* \* The things you must find in favor of these plaintiffs and against these defendants is the following:

“ \* \* \* (2) That under and pursuant to the *terms of the contract the commissions are now due, owing and payable from these defendants to these plaintiffs . . .*” (R. 223, 224).

The court when it speaks of the “terms of the contract” is, of course, referring to the oral contract between plaintiffs and defendants.

Plaintiffs have spent considerable space in their brief talking around and about fraud and overreaching. Suffice to call to the court’s attention that neither in the original complaint nor in the amended complaint is there any allegation of fraud or wrongdoing. Plaintiffs do not raise on appeal any allegation of error on the part of the trial court in admitting or excluding evidence of the insinuated fraud. It is elementary that one who brings an action footed in fraud must allege his facts with particularity. See Rule 9-b. Utah Rules of Civil Procedure. It would seem that that which was neither alleged in the original nor the amended complaint can hardly with propriety be argued on appeal.

## POINT I

THERE IS INSUFFICIENT EVIDENCE TO SUPPORT A PRESENT CONTRACTUAL DUTY IN DEFENDANTS TO PAY PLAINTIFFS THE AMOUNTS DEMANDED IN THE AMENDED COMPLAINT.

## ARGUMENT

### POINT I

THERE IS INSUFFICIENT EVIDENCE TO SUPPORT A PRESENT CONTRACTUAL DUTY IN DEFENDANTS TO PAY PLAINTIFFS THE AMOUNTS DEMANDED IN THE AMENDED COMPLAINT.

The trial court correctly granted judgment for defendants and against plaintiffs notwithstanding the verdict because of the insufficiency of the evidence to support a present contractual duty in defendants to pay plaintiffs the monies demanded in the amended complaint.

There is no dispute as to plaintiff's general statement of the law applicable in the cases of this nature. The applicable proposition of law is well known and generally accepted. The law is well stated in the case of *Morby v. Rogers*, .... *Utah* ....; 252 P 2d 231, p. 232 as follows:

"It is well settled that in order for a court to grant a request for a directed verdict or for a judgment notwithstanding the verdict grounded on non-negligence of defendant, the record must disclose no evidence against the party so requesting upon which reasonable minds could find him guilty of the negligence charged. The issue here, then was whether the record disclosed any evidence upon which the jury could have found the appellant guilty of negligence."

Though the above quoted case sounds in tort and the instant case sounds in contract, the general rule is equally applicable. See *Scoville v. Kelloggs Sales Company*, .... *Utah* ...., 261 P 2d 933. Translated to a contract fact situation, the rule could be stated as follows:

“It is well settled that in order for a court to grant a request for a directed verdict or for a judgment notwithstanding the verdict because of the non-existence of a contractual duty sought to be imposed, the record must disclose no evidence against the party so requesting from which reasonable minds could infer the existence of the duty.”

An examination of the evidence reveals no evidentiary base to support the required inference of a present contractual duty in defendants to personally pay plaintiffs the sums demanded. One needs ask, if such a purported duty exists, at what point in time did it arise? An examination of the evidence (in preference to the assertions of plaintiffs) will, of course, reveal that such a duty has yet to arise. It is the position of the defendants that it was within the contemplation and agreement of defendants and their sales force that the defendants' duty to pay plaintiffs the monies demanded would arise only upon receipt by defendants from the seller, Felt Syndicate, of the commission monies earned.

This position is based on two evidentiary foundations. (1) The express understanding of the parties as revealed by their testimony. (2) The custom of the real estate business.

The evidence is without dispute that more than one half of the commission monies earned has yet to be received by the defendants from Felt Syndicate, the seller. Felt Syndicate, of course, suffered financial reverses. That fact supplies the revealing reason for the commencement of this lawsuit. The revealing facts indicated in the testimony excerpts which follow, are that all parties contemplated (1) defendant broker would receive the monies from the seller prior to his payment

over to the salesmen of their proportionate share, and (2) as a general custom a broker would not pay out of his own pocket sales commissions on a deal that had "gone sour."

Beginning at R. 48, plaintiff Anderson testified that his sales commissions were going to come on a basis different from usual; that rather than dividing with the broker at the time of sale the commission extracted from the usual down payment, no monies were to be received initially; that the first installment on the commission was to be made at some time in the future; that commissions were to come on a deferred, periodic, basis; that defendants were to collect the commissions from Felt Syndicate, the seller; that defendants were to retain the commissions thus collected until they had sufficient monies credited to plaintiffs to disburse commissions to plaintiffs in amounts equal to 25 per cent of commissions earned; that on several occasions defendants did disburse to plaintiff Anderson commission payments which were received by Anderson at the times paid without protest or demands for additional payment. At page 70 of the Record the following testimony of plaintiff Anderson is recorded:

"Q. So, by way of recapitulation you, at the time of the Morningside Heights transaction, agreed to sell these homes for the sum of \$100.00 apiece.

\* \* \* \*

"A. Yes.

"Q. And you understood that the payments were to come from Wright-Wirthlin, that they were to collect the payments for you did you not?

"A. Yes.

"Q. And that they were *to disburse them to you as they received them on a deferred basis*, based on the degree of completion of the homes you had sold?

"A. Yes."

A fair and reasonable reading of this testimony indicates that plaintiff Anderson contemplated receipt by defendants from Felt Syndicate of the commission monies prior to the time they were to be disbursed to the salesmen. *The monies were to be accumulated until the sum was large enough to pay out to plaintiff salesmen with bookkeeping ease. Certainly such an arrangement would be unnecessary if the duty to pay arose in defendants prior to the time the monies were received.* It was in addition, initially contemplated that the broker would obtain from the seller monies at various stages of house construction. One of the stages was the final completion of the houses. Mr. Anderson at page 58 in response to an inquiry states:

"A. The homes that I have sold have been occupied by the people who purchased, or subsequently purchased and sold, for many months, and I still believe they aren't considered as having been completed."

He further states at page 59 of the Record:

"A. No, I don't know if they are 100 per cent completed or not."

The testimony of others, including Mr. Doidge of the financing institution, re-affirm the non-completion of the homes (R. 138, 157, 167-168).

Plaintiff Baker reinforces the position of defendants on page 99 of the Record where the following questions were put and the following answers given:

"Q. Mr. Baker, have you ever been paid on a commission that the broker didn't receive the money first?

"A. No, I don't think I have. That question is a little strange though, Reed. Can I qualify it a little?

"Q. Just answer my question if you will. Let me guide you along. Mr. King will bring anything out, I'm sure. You have never had a broker pay you a commission on a deal that has gone sour, have you, out of his own pocket?

"A. No.

"Q. You didn't expect it?

"A. No, I didn't expect it."

Plaintiff Baker testified in addition that the commissions were to be paid on a deferred basis; that he understood Felt Syndicate was the seller; that he would like to get his money from whoever owes it.

Plaintiff Knudson testified as follows on page 112 of the Record:

'Q. And isn't it is the custom that the salesman doesn't receive his money until the broker does?

"A. There are different circumstances on that. When you sell a house you usually bring in enough money to pay that commission.

"Q. That is correct. But the general rule is that the salesman doesn't get his money until the broker does, isn't it?

"A. That's right."

He further testified on page 115 of the Record as follows:

"Q. It is customary that the seller pays the commission on these sales, isn't it?

"A. That's right.

"Q. And you expected that this situation was usual and when the seller would pay the money to Wright-Wirthlin they would pay you would they not?

"A. If they got it.

"Q. You knew that they would pay it if they got it?

"A. Yes, I had confidence in Wright-Wirthlin."

And at page 116 of the Record, plaintiff Knudson states further:

"Q. You didn't expect them (Wright-Wirthlin) to pay you from their own monies on this transaction did you, Mr. Knudson?

"A. I wasn't under that impression."

Plaintiff Shepard's testimony didn't materially differ from that of the other three plaintiffs. He testified that he was to sell at \$100.00 per house; that no monies except loan costs were to be received from the purchaser of a house; that such monies received were not to be divided by the broker or the salesmen; that it would be some time before the broker was to get the first portion of the commission; that when the houses were at various stages of completion the broker was to get various commission draws; that commission payments were to be on a deferred basis; that he inquired of defendants about the collection of monies from Felt Syndicate; that he never demanded payment from Wright-Wirthlin; that he received various disbursements without protest.

In accord with the testimony of the plaintiffs, Mr. Wirthlin, one of the defendants, testified that the proposed compensation per house sold was to be \$100.00 (R. 151, 161); that the commissions were to be paid on a deferred basis as the house construction progressed; that the salesman's share of the commissions earned would be paid over upon receipt of the commissions from the seller (R. 161); that the proportionate share of the monies received from the seller has been disbursed to the salesmen; that any monies received in the future from the seller would likewise be disbursed to the salesmen (R. 164); that the houses have not yet been completed (R. 157).

Mr. Walker, a member of the sales force at the time of the Morningside Heights transaction, and who was present at the sales meetings at which the sales arrangement was discussed, testified as follows at page 183 of the Record:

"Q. And did he (Mr. Wirthlin) tell you where or how the money was to be paid?

"A. He told us that the money would be paid to us as fast as it would be paid to them."

Mrs. Ackerson, a member of the sales force at the time of the same transaction, at page 203 of the Record testified as follows:

"Q. And how was the sum to be paid to you?

"A. As the houses were completed. A certain percentage as the brokers received their money."

Mr. Wright, another of the defendants' testified at page 207 of the Record as follows:

"A. We were to receive our money at various stages as

the construction progressed and the salesmen in turn were to get their money as we were paid ours.”

And at page 208:

“Q. Now with reference to your salesmen, how were they to be paid, Mr. Wright?

“A. They were to receive their proportionate share as we received ours.”

Noting:

(1) Over half the commissions earned remain uncollected from the seller.

(2) Commissions were to be disbursed on a deferred basis to plaintiffs after receipt from seller by defendants.

(3) Plaintiff's commissions were to be accumulated by defendants until a sufficient amount was accumulated to be paid out in sums of \$25.00 or similar amounts.

(4) The custom of the real estate business is that the broker receives the commission money prior to the payment over to the salesman of his share of a commission.

(5) Plaintiffs didn't expect defendants to pay plaintiffs from their own monies nor did they expect payment on a deal “gone sour”—then, reasonable minds noting such facts and considering them in the light most favorable to the plaintiffs, could not find a present existing contractual duty in defendants to pay plaintiffs the monies demanded. To the contrary, reasonable minds could only conclude that such a duty had yet to arise.

*Ley v. Fred T. Ley and Co.*, 65 N. Y. S. 2d 843, well states the law as follows:

“The pertinent law is succinctly stated in Clark’s New York Law of Contracts Vol. 2, Sec. 964, as follows: ‘An agreement by a person to make payments to another from a particular fund to be realized in the future, if based on a consideration, is valid and binding, but in such a case the realization of the fund is ordinarily a condition precedent to any liability on the part of the promisor to make the payments’.”

*Mascioni v. Miller*, 184 N. E. 473, 261 N.Y. 1 (1933) is a case in point of persuasive authority. In that case a general contractor promised to pay a sub-contractor for his work and materials “Payments to be made as received from the owner.” This was held to make receipt of the money from the owner an express condition; and the court said that “the event upon which that promise would ripen into an absolute immediate obligation has not occurred.” Likewise in the instant case the necessary event—the receipt of the monies from the seller by the defendants—has not occurred. Until the occurrence of such an event there is no present existing contractual duty on the part of defendants to pay plaintiffs the monies demanded. This is inescapably made clear by the testimony of the parties as to (1) the express understanding of the parties, and (2) the custom of the business. Reasonable men can draw but one inference. That inference points to the lack of a present existing contractual duty on the part of defendants to pay plaintiffs the monies demanded.

## CONCLUSION

A review of the entire proceedings and the law in relation thereto shows that the evidence is insufficient to support a pres-

ent contractual duty in defendants to pay plaintiffs the monies demanded. It is respectfully submitted therefore that the action of the trial court in entering judgment for defendants and against the plaintiffs notwithstanding the verdict should be affirmed.

Respectfully submitted,

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