

1955

Wallace R. Smith dba Smith Realty Company v. C. Taylor Burton : Brief of Appellant

Utah Supreme Court

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Rawlings, Wallace, Roberts & Black; Dwight L. King; Counsel for Appellant;

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Case No. 8302

IN THE SUPREME COURT
of the
STATE OF UTAH

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Clerk, Supreme Court, Utah

WALLACE R. SMITH, dba SMITH
REALTY COMPANY,

Plaintiff and Appellant,

— vs. —

C. TAYLOR BURTON,

Defendant and Respondent.

BRIEF OF APPELLANT

RAWLINGS, WALLACE,
ROBERTS & BLACK and
DWIGHT L. KING

Counsel for Appellant

530 Judge Building
Salt Lake City, Utah

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WALLACE R. SMITH, dba SMITH
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— vs. —

C. TAYLOR BURTON,

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Case No. 8302

BRIEF OF APPELLANT

PRELIMINARY STATEMENT

Throughout this Brief, Appellant will be referred to as plaintiff, and respondent will be referred to as defendant. All italics are ours.

STATEMENT OF FACTS

This appeal arises out of an action by plaintiff against defendant for real estate commissions. Plaintiff filed his complaint and prayed judgment in the sum of \$6,000.00. The \$6,000.00 was made up of two separate

items. Two thousand dollars was claimed under a memorandum agreement which is marked Exhibit No. 7. The balance of \$4,000.00 plaintiff claims to be due under the document entitled "Commission Agreement" which is Exhibit No. 2.

The case was tried before the Honorable Joseph G. Jeppson sitting without a jury. At the conclusion of the trial, the Court entered judgment in favor of plaintiff and against defendant for the \$2,000.00 claimed under Exhibit No. 7, but denied plaintiff's claim for the \$4,000.00 represented by Exhibit No. 2.

Plaintiff, during the late fall of 1952 and the spring of 1953 in his real estate business, was able to sell for defendant seven duplex apartments located on Navajo Street and Glenrose Drive in Salt Lake City. In the transaction, Elder, the buyer, and Burton agreed that the value for the duplexes would be the sum of \$19,000.00 each (R-243).

At the close of the Elder transaction, defendant did not pay plaintiff any commission for the exchange of his seven duplex apartments, (the Elder agreement is represented by Exhibit No. 1.), but instead made a memorandum on the back of Exhibit No. 1 showing the way in which the commission for the Elder transaction was to be paid. This memorandum is dated on the 31st of January, 1953. Thereafter, on the 17th day of February, 1953, plaintiff prepared Exhibit No. 2 entitled "Com-

mission Agreement" and all parties executed it. The Commission Agreement sets forth more fully the manner of paying plaintiff for his commissions on the Elder transaction. It is from the Court's interpretation of Exhibit No. 2 that plaintiff appeals.

Exhibit No. 2 provides that plaintiff shall receive one duplex and all in excess of \$17,000.00 that shall be received for the two other duplexes which remain in the group of ten duplexes that defendant originally owned.

On or about the 1st day of May, 1953, plaintiff obtained for defendant an acceptable exchange agreement with one Frank W. Toone. Toone was the owner of a ranch near a property which defendant received in the Elder exchange. The Toone property compliments and is adjacent to defendant's property.

The Toone transaction, which was accepted by defendant, is set forth in Exhibit No. 3. It provided for the transfer to Toone of the two remaining duplexes, two real estate contracts owned by defendant, property subject to a mortgage, and for the payment by defendant of \$3,000.00 cash. Toone transferred his ranch at Liberty, Utah. For the services of plaintiff in securing the Toone transaction, defendant agreed to pay the sum of \$2,000.00, together with a sorrel horse, saddle and bridle.

The transaction represented by Exhibit No. 1 and No. 3 were fully consummated and all parties performed

their respective duties. Both agreements were obtained through the sole efforts of plaintiff acting as a real estate broker.

After the Toone transaction, defendant transferred the duplex described in Exhibit No. 2 to plaintiff. Thereafter, plaintiff demanded the payment of the \$2,000.00 for the Toone transaction and the \$4,000.00 which was due under the terms of Exhibit No. 2. Defendant refused to pay any sum whatsoever and has never paid to defendant any portion of the monies claimed under Exhibit No. 2 and No. 7.

The lower court found in the Findings of Fact, that in the exchange agreement there was an agreed exchange price for each duplex transferred by defendant to Toone of \$19,000.00. The court found also that defendant did not obtain more than \$17,000.00 net in cash and therefore, ruled that no commission was earned by plaintiff on the exchange of said duplexes with Toone under the terms of Exhibit No. 2 (R-253, Finding No. 5). From the finding that plaintiff was not entitled to any commission for the exchange of the two duplexes, plaintiff appealed.

The Court found that defendant was indebted to plaintiff for the \$2,000.00 represented by the memorandum contained in Exhibit No. 7 and that said sum had not been paid but was due and owing to plaintiff (R-253, Finding No. 6). The Court found in Finding No. 8,

R-254, that the commission agreements shown by Exhibit No. 2 and Exhibit No. 7 did not merge but remained separate and distinct agreements throughout the dealings between plaintiff and defendant.

The basic objection that plaintiff makes to the Court's Finding of Fact, Conclusions of Law and Decree is that it misinterprets the meaning of Exhibit No. 2, the Commission Agreement, in that it finds that unless the sale of the two duplexes remaining for plaintiff to sell after the Elder transaction were sold for cash, plaintiff could not earn a commission by effecting their sale.

STATEMENT OF POINTS RELIED UPON

POINT I.

THE COMMISSION AGREEMENT UNEQUIVOCALLY PROVIDES FOR THE PAYMENT TO PLAINTIFF OF THE EXCESS OF \$17,000.00 OBTAINED AS EITHER A SALE OR EXCHANGE PRICE OF THE DUPLEXES.

(a) *The Commission Agreement must be interpreted as a whole.*

(b) *Plaintiff is entitled under the Commission Agreement to be paid the sum of \$4,000.00.*

ARGUMENT

POINT I.

THE COMMISSION AGREEMENT UNEQUIVOCALLY PROVIDES FOR THE PAYMENT TO PLAINTIFF OF THE EXCESS OF \$17,000.00 OBTAINED AS EITHER A SALE OR EXCHANGE PRICE OF THE DUPLEXES.

(a) *The Commission Agreement must be interpreted as a whole.*

The terms of the Commission Agreement are contained in two basic written instruments. In chronological order, the first is the longhand written memorandum found on the back of Exhibit No. 1. This memorandum preceded by approximately seventeen days the Commission Agreement contained in Exhibit No. 2. It sets forth the agreement by defendant to transfer one duplex to plaintiff and on condition that plaintiff dispose of the two remaining duplexes "at a net figure to seller of \$17,000.00 each" and provides that defendant "will accept reasonable terms." No mention of cash is made in the longhand memorandum on Exhibit No. 1. The inclusion of the provision that defendant "will accept reasonable terms" would seem to negate any possible inference that defendant would only pay commission if plaintiff sold the duplexes for cash.

Exhibit No. 2 contains an explicit provision when discussing the price to be obtained for the duplex apartments. It reads as follows:

"It is agreed that the conveyance shall be made to the Broker at a time when the sale or exchange has been made or effected by the Broker, or said First Party, or any other Party of the following described Duplex Property now belonging to said First Party, namely: 1161 and 1163; and 1325 and 1327 Navajo Street, in Glendale

Garden, Plat "E" Addition, to Salt Lake City,
at a selling or exchange price of \$17,000.00 NET
to said First Party, * * *

The next reference in the Commission Agreement to the \$17,000.00 net amount is in the seventh paragraph of the agreement and it reads as follows:

"IT IS FURTHER AGREED, that in the event the Broker shall sell First Parties duplexes for a sum greater than \$17,000.00 NET, then and in event the Broker shall be entitled to retain such excess of money as a further Commission compensation for his efforts. But when such sales or exchanges has been made of said Properties, or should First Party withdraw said properties from the market, then the conveyance to the Broker of his said property shall be made."

It is apparent that the two paragraphs of the Commission Agreement, when taken together, anticipate either a sale or an exchange and both are within the contemplation of the parties. The only place where price is mentioned is in the fifth paragraph of the Commission Agreement and there the same price is set on either a sale or an exchange.

It is an undisputed rule governing the interpretation of agreements that a writing is interpreted as a whole and all writings forming part of the same transaction are interpreted together. See, *Restatement of the Law of Contracts*, Vol. 1, Page 319, No. 238 (c).

The agreements contained in Exhibits No. 1 and No. 2 were both drawn following an exchange of properties in which plaintiff was the real estate broker and defendant one of the sellers. Both parties therefore, were familiar with the nature of transactions which might be necessary to dispose of defendant's property to his satisfaction. The transactions out of which plaintiff's claims for commission arise, are fully consummated transactions. There is no argument nor contention that plaintiff was not the causative factor of all transactions involved. To the present time, plaintiff has never received any commissions for the consummation of the two exchanges except the transfer of one duplex apartment.

The question of whether or not a broker who has a listing is entitled to a commission where he has made an exchange rather than a sale for cash was before this court in the case of *Blackburn v. Bozo*, 82 Utah 556, 26 P. 2d 542. In the Blackburn case, the seller refused to pay the broker his commission and his defense was that the property was not sold for \$5,500.00 cash which was the price which seller demanded when listing the property with the broker. The transaction which was consummated by the broker was one involving an exchange of properties and the evaluation for the exchange was the sum of \$5,000.00 rather than \$5,500.00 which was the amount which defendant requested in his listing. This court, in a decision written by Justice Folland, concluded that the broker was entitled to his commission and interpreted the language of the listing agreement, "Any other terms

that may be agreeable to me” as meaning, that the broker would be entitled to his commission if an exchange of properties was agreed upon by the owner giving the listing. Similar language was included in the provision contained in Exhibit No. 1 where defendant agreed that he would accept reasonable terms. “Reasonable terms” and “any other terms that may be agreeable to me” it is plaintiff’s position are identical in meaning.

We do not have a problem of arriving at the proper valuation of the properties here. All parties agreed and the court has found in accordance with that agreement that the exchange value was fixed at \$19,000.00 per duplex. We do not have any problem as to how much plaintiff was to receive for an exchange or sale for it was agreed that he was to have the excess over \$17,000.00 net to seller. The problem which arises involves the manner of payment since what seller received was a ranch which could not be severed. Plaintiff could not, as a practical matter, receive the value in excess of \$17,000.00 which the ranch represented. This particular problem is not solved by the explicit language of the agreements of the parties. However, plaintiff submits that the ruling in the Blackburn v. Bozo (supra) case should be controlling and that plaintiff is entitled to be paid his commission of \$2,000.00 each on the consummation of the transfer.

(b) Plaintiff is entitled under the Commission Agreement to be paid the sum of \$4,000.00.

The lower court's interpretation of the Commission Agreement inserts into the agreement the words "cash sale." The agreement contains only the word "sale" and the figure of "\$17,000.00." At no place is there any language which would justify the insertion of the word "cash" in the transaction and neither party during the negotiations indicated any complaint about the transactions involved not being for cash.

Defendant paid cash as well as transferred property in exchange for the real property of Toone. He did not receive a payment of money at any time. This kind of a transaction, while denominated by the various instruments as an "exchange", is actually a "sale" as that term is defined in the law.

An "exchange" in the law involves a barter or a trading of property where no values in dollars are assigned. In the common law, an exchange could not be any transaction which was not the transfer of like properties. *Hawn v. Malone*, 188 Ohio 439, 176 N.W. 393; *Gill v. Eagleton*, 108 Nebr. 179, 187 N.W. 871; *Apple v. Henry*, 65 Mont. 244, 213 P. 444. What the real estate people have designated as an "exchange" is actually two sales, for as a general rule the transactions involve the assignment by the parties of a dollar value to the properties exchanged. In the case at bar, all parties assigned a dollar value to the properties which were being traded. Exhibits No. 4 and No. 6 demonstrate the assignment of values which defendant placed on his properties. Ex-

hibits No. 16, No. 17 and No. 22 demonstrate the value placed on his property by the seller, Toone. In law, both the Elder and Toone transactions were sales. A sale by Burton to Toone of the two duplexes and the other property which he transferred under the exchange agreement. A sale by Toone to Burton of his ranch at Liberty, Utah. This fact has been recognized by the courts and even enacted into law by statute. In *Robbins v. Pacific Eastern Corporation*, 8 Calif. 2d 241, 65 P. 2d 42, 56, the California court discussing the nature of exchanges, defined the same in the following language:

“Before setting forth the reasoning supporting these conclusions some reference should be made to the legal nature of an exchange. In law, an exchange is two sales. At the time of the transaction here involved, the Civil Code (1929) provided: Section 1804: ‘Exchange is a contract by which the parties mutually give, or agree to give, one thing for another, neither thing, or both things, being money only.’ Section 1806: ‘The provisions of the title on sale apply to exchanges. Each party has the rights and obligations of a seller as to the thing which he gives, and of a buyer as to that which he takes.’ ”

The fact that an exchange is in truth two separate sales is recognized by the Salt Lake Real Estate Board and it has been adopted into the rules and regulations governing brokers and their transactions. Exhibit No. 14 at page 3 as Rule 10 states as follows:

"The same commissions, rules, and customs as apply to sales shall apply to exchanges. Regular commissions shall be paid by each owner."

The law requires strict compliance by brokers with the provisions under which their commissions are earned. Where their performance has been the effective cause of a sale and they have brought about the result which the owner of the property desired, it appears to plaintiff that this court should be equally strict in protecting the brokers right to his commission.

It is submitted that here where the result for which plaintiff was to be paid has been accomplished, and a transaction satisfactory to defendant consummated through the efforts of plaintiff, he is entitled to his commission. Therefore, it is respectfully submitted that this court should correctly interpret the Commission Agreement and award to plaintiff an additional judgment in the sum of \$4,000.00 under the terms of Exhibit No. 2.

CONCLUSION

The plaintiff respectfully submits that the interpretation placed on the Commission Agreement by the lower court is erroneous, that plaintiff is entitled to be paid

the commission of \$2,000.00 each on the two duplexes transferred under the Exchange Agreement, and that this court should order judgment in the additional sum of \$4,000.00 under the terms of Exhibit No. 2.

Respectfully submitted,

RAWLINGS, WALLACE, ROBERTS
& BLACK AND DWIGHT L. KING

Counsel for Plaintiff

530 Judge Building
Salt Lake City, Utah

Received copies of the within Brief of
Appellant this day of March, A.D., 1955.

Counsel for Defendants and Respondents