

1980

Taylor National, Inc. v. Jensen Brothers Construction Co. : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

TAYLOR NATIONAL, INC.,

Plaintiff-Appellant,

vs.

JENSEN BROTHERS CONSTRUCTION
COMPANY, a corporation,

Defendant and Third Party
Plaintiff-Respondent,

Case No. ~~17,074~~ 17091

vs.

JESSE R. HARRISON and WILLIAM
J. SOULE, d/b/a VALUE REALTY
and LEON HARWARD,

Third Party Defendants,
Third Party Plaintiffs,
and Counterclaimants,

vs.

PAUL H. TAYLOR, JOHN DOES I
through IV, whose true names
are unknown, agents of Jensen
Brothers Construction Company,
a corporation,

Third Party Defendants,

LEON HARWARD,

Third Party Defendant
and Third Party Plaintiff,

vs.

TAYLOR NATIONAL, INC.,

Plaintiff and Third Party
Defendant.

BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT OF THE DISTRICT
COURT OF THE FOURTH JUDICIAL DISTRICT IN AND
FOR UTAH COUNTY, STATE OF UTAH
HONORABLE J. ROBERT BULLOCK, JUDGE

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TAYLOR NATIONAL, INC.,

Plaintiff and Third Party
Defendant.

BRIEF OF RESPONDENT

The following Statement of Facts is submitted in support of respondent's position and in opposition to any contradictory portions of the appellant's Statement of Facts.

RESPONDENT'S STATEMENT OF FACTS

In its Findings of Fact (R. 285, et seq.), which are uncontroverted by the appellant, the trial court concluded that the evidence presented showed that the defendant Jensen Brothers Construction Company ("JBC") entered into a real estate listing agreement with the plaintiff Taylor, National, Inc., ("Taylor National") whereby Taylor National agreed to act as an agent for JBC in procuring the sale of a residence located in Orem, Utah (R. 287, Finding of Fact No. 3). Taylor National thereafter did, in fact, make substantial efforts to sell the house (Id.); however, when Paul Taylor, as agent of the plaintiff, was informed by JBC that third party plaintiff Leon Harward was interested in purchasing the home, Taylor National did not contact Harward nor was any attempt made to negotiate with him incident to the sale. R. 287, Finding of Fact No. 4.

Harward, a licensed real estate salesman, was informed by JBC several weeks prior to the closing date that Taylor National was the listing realtor (R. 287, Finding of Fact No. 5). Nevertheless, Harward failed to contact Taylor National either to present an offer for purchase of the home

through that company for Harward's own account or to negotiate a commission split with the plaintiff for his employer, Continental Value Realty, at any time prior to the final closing of the purchase in December of 1977. Id.

In mid-October of 1977, Leon Harward informed JBC that Taylor National, the listing realtor, had not contacted him and that unless an Earnest Money Agreement was entered into between Harward and JBC without further delay, Harward would attempt to negotiate a home purchase elsewhere. Based upon these representations by Harward, JBC entered into an Earnest Money Agreement for sale of the house. R. 288, Finding of Fact No. 6.

Taylor National was informed of the Earnest Money Agreement soon after it was signed on October 19, 1977. However, neither the plaintiff as listing realtor nor third party defendant Leon Harward as real estate salesman for Value Realty made any attempt to communicate with each other concerning final purchase arrangements, closing of the transaction, negotiation of a real estate commission split between listing realtor and selling realtor or arrangements for payment of a real estate commission to plaintiff prior to the date of closing, December 9, 1977. R. 288, Finding of Fact No. 8.

The sale closed on December 9, 1977, at which time a six percent real estate commission was deducted by the clos-

ing agent from proceeds of the sale, which were otherwise payable to the seller, JBC. The amount of the commission, \$8,400, was identical to the amount ostensibly given by Leon Harward as purchaser to his employer, Continental Value Realty, as earnest money pursuant to the terms of the Earnest Money Agreement. The \$8,400 earnest money was never deposited with the closing agent, but instead was retained by Harward as agent for third party defendants Harrison and Soule, dba Continental Value Realty, as the total sales commission. R. 288-89, Finding of Fact No. 10.

The trial court found that JBC had paid the six percent real estate commission in good faith at the time of closing, believing it had fulfilled its obligation in accordance with the Earnest Money Agreement. R. 289, Finding of Fact No. 11.

As to the actions of the plaintiff Taylor National in failing to contact Harward, the buyer, the trial court concluded:

9. Plaintiff as listing realtor to JBC and its fiduciary failed to take reasonable and necessary measures to protect its real estate commission as against third party defendant Leon Harward and Continental Value Realty.

* * *

12. Plaintiff in failing to exercise its responsibilities as fiduciary to defendant JBC in equity and good conscience has waived and is otherwise estopped from recovery of a second real estate commission against defendant JBC or from recovery of an attorney's fee against JBC

incident to collection of any sales commission owing to plaintiff, except as may be recovered through JBC from third party defendants Harward, Harrison and Soule.

R. 288, 289, Findings of Fact Nos. 9 and 12.

In light of these facts the court found that:

16. Plaintiff Taylor National, Inc., is entitled to judgment against defendant JBC for the sum of \$8,400.00 plus 6% interest from and after December 9, 1977, except that it is inequitable for plaintiff to execute against JBC or otherwise take liens or encumber JBC assets as a result of any judgment in favor of plaintiff for sales commission on the Barrington House.

R. 290, Finding of Fact No. 16. The court further determined that JBC was entitled to judgment against third-party defendants Harward, Harrison and Soule for \$8,400.00 "for conversion of the \$8,400.00 real estate commission retained by said third-party defendants." R. 294, Findings of Fact No. 19(i).

The trial court's findings thus show a rather complex factual situation not readily reconcilable through a standard form of judgment. Taylor National is entitled to a commission on the sale of JBC's house to Harward. Yet JBC has already paid the commission in good faith into the closing escrow in reliance on Harward's assurances that he will take care of JBC's obligation to Taylor National and on the fact that JBC has notified Taylor National of the sale, the buyer-realtors identity, and the date of closing with a request that Taylor National work with the buyer as its fiduciary

obligation. Nevertheless, Taylor National fails in its obligation to JBC by not making adequate efforts to contact Harward and protect its commission, and Harward converts the already paid commission money, which he held in trust and was not entitled to, to his own use.

The fact that Taylor National had failed to join Harward as a defendant was a further complication because the court was thus powerless to give direct relief as between those parties.

The trial court nevertheless arrived at a simple and equitable solution to the problem in its judgment, awarding Taylor National the \$8,400.00 which it was due as commission with the equitable limitations that execution not issue against JBC and that the judgment not constitute a lien on JBC property, but permitting Taylor National to pursue JBC's third-party judgment in the same amount against Harwood, Soule and Harrison. R. 299-300, paragraph 1.

This judgment by the trial court is a creative and just resolution of the controversy before it, which puts the risk of an uncollectible judgment and the costs of collection on the plaintiff whose failure of fiduciary duty caused the controversy, and not on the defendant who, acting in good faith, had already paid its obligation once.

The trial court's judgment is wholly justifiable under the facts and applicable law. Nevertheless, should this Court

find invalid the provisos that execution not issue nor the judgment consistute a lien on JBC property, then the judgment as to JBC should be reversed or, in the alternative, vacated and remanded for further proceedings.

ARGUMENT

POINT I

THE COURT HAS EQUITABLE POWER TO FASHION
APPROPRIATE REMEDIES WHERE THERE HAS BEEN
A BREACH OF FIDUCIARY DUTY.

In Reese v. Harper, 329 P. 2d 410 (Utah, 1958), the Utah Supreme Court noted that the privilege of acting as a real estate broker and the inherent nature of the service performed gives rise to special responsibilities:

Accordingly, persons who entrust their business to such agents are entitled to repose some degree of confidence that they will be loyal to such trust and that they will, with reasonable diligence and in good faith, represent the interests of their clients.

* * *

Because of the specialized service the real estate broker offers in acting as an agent for his client, there arises a fiduciary relationship between them; it is incumbent upon him to apply his abilities and knowledge to the advantage of the man he serves; and to make full disclosure of all facts which his principal should know in transacting the business. Failure to discharge such duty with reasonable diligence and care precludes his recovery for the service he proports to be rendering. (Footnotes omitted.)

Id., at 412.

In the instant case, the trial Court concluded that JBC
had already paid in good faith the full commission due on

the sale of the house and should not have to pay a second commission to Taylor National because of its breach of duty. The court further concluded that although Taylor National was in breach of its fiduciary duty owed to JBC, that, vis-a-vis third party defendants Value Realty and Leon Harward Taylor National should have the commission and third party defendants were not entitled to it. Since the court could not award a direct verdict in favor of Taylor National against Harward and Value Realty, it chose to do equity by allowing Taylor National to execute on JBC's award and to protect JBC by forbidding execution against it.

Taylor National argues that, in effect, once the Court has found that the commission is due under its contract with JBC, the Court must strictly enforce the entire contract and may not condition its judgment no matter what the equities may be. However, "equity is not bound by technicalities, but can usually find a way to afford redress for the wrongful acts of one clothed with fiduciary power." Dinsmoor v. Hill, 187 P. 2d 388, 340 (Kan., 1947). Further, "a breach of fiduciary duty is ground for the exercise of equity jurisdiction in the absence of an adequate and complete remedy at law." 27 Am. Jur. 2d, Equity, Section 20, at 544. If Taylor National were to have its way in the instant case, JBC would be faced with the potential loss of two commissions as a result of Taylor National's own failure to fulfill its fiduciary responsibilities. However, the Court

may use its equitable powers to render a judgment which preserves the equities among the parties in a way which a purely legal remedy would not.

The Utah Supreme Court has held that even in an action which is essentially legal in nature, such as Taylor National's claim for a commission in the instant case, equitable principles may be applied by the Court:

The rules of equity arose as a means of avoiding or ameliorating the rigidities and harshness of some of the rules and remedies of law. It is also to be observed that the differences between law and equity are not so distinct as they were in former times. The lines between them have become blurred and they have become for the most part blended together in what we refer to generally as equity and justice.

* * *

Consistent with the foregoing, equitable claims or defenses may be asserted and tried along with or against legal claims or defenses in the same action; and equitable principles may be applied in an action at law. We can see no reason why the doctrine we have just spoken of as being rooted in equity and good conscience should have any affinity for, or limitation in application to, any particular type of conduct or controversy. The principles of equity and justice are universal; they apply wherever appropriate and necessary to enforce rights or to prevent oppression and injustice. (Emphasis added.)

Williamson v. Wanlass, 545 P. 2d 1145, 1148 (Utah, 1976).
See Marlowe Investment Corporation v. Radmall, 485 P. 2d 1402 (Utah, 1971).

The instant case involves not only the plaintiff's claim at law for its commission, but also JBC's equitable defense of estoppel based on Taylor National's breach of fiduciary duty. See R. 13, Ninth Defense. Under the circumstances,

the Court has the power in equity, and the duty, to shape a judgment which takes into consideration equitable principles in arriving at a just result. This the lower court has done in this case.

POINT II

A STAY OF EXECUTION ON TAYLOR NATIONAL'S JUDGMENT AGAINST JBC IS AN APPROPRIATE REMEDY WITHIN THE BOUNDS OF UTAH LAW.

Because JBC acted in good faith in allowing the commission to be disbursed to Harward and because Taylor National failed in its fiduciary duty to JBC and to itself to protect its commission, the trial court determined that it would work an injustice were the Court's judgment to result in JBC having to pay two commissions instead of the one for which it contracted. R. 289, 290, Findings of Fact Nos. 11, 12 and 16. This might well be the result if JBC is forced to satisfy Taylor National's judgment and is then unable to collect on its judgment over against Harward and Continental Value Realty. For this reason the Court has used its equitable powers to allocate to Taylor National, because of its breach of duty, the risk that JBC's judgment against Harward and Continental Value may be uncollectible. Under the circumstances, the Court has protected Taylor National by allowing it to execute against Harward and Continental Value Realty pursuant to JBC's third party judgment against those parties.

A. Utah Law Permits Execution of a Judgment to be Stayed on Equitable Grounds.

Taylor National protests this portion of the judgment

on the basis that there is no Utah law which supports such an arrangement. Rule 62 of the Utah Rules of Civil Procedure provides in Subsection (a) that:

(a) Stay upon entry of judgment. Execution or other proceedings to enforce a judgment may issue immediately upon the entry of the judgment, unless the court in its discretion and on such conditions for the security of the adverse party as are proper, otherwise directs.

In Palmquist v. Palmquist, 312 P.2nd 779 (Utah, 1957), the Utah Supreme Court recognized that this Rule would allow a stay of execution on equitable grounds, where "some injustice would result were execution not stayed". Id. at 780. The Palmquist holding was cited with favor by this Court in a recent unpublished opinion in the case of Blackburn v. Blackburn, Case No. 16651, filed July 17, 1980. The lower court exercised its discretion in this case to prevent injustice by staying execution on Taylor National's judgment against JBC and providing security to Taylor National by allowing it to execute on JBC's third party judgment.

B. The Stay of Execution is Proper on Equitable Grounds As a Conditional Judgment.

Further, in the instant case, the court has in practical effect conditioned Taylor National's right to execute on its judgment against JBC on a successful execution against the third party defendants under JBC's judgment over against them. There is substantial precedent for such a conditional judgment:

The judgment itself may contain a stay of execution which may be conditional. The Court

in an equity suit has power to make provisions for the time when a judgment is to be carried into effect.

33 C.J.S., Executions, Section 39, at 312. Further, the power of a court to enter a conditional judgment is well established:

When a court of equity renders a conditional decree, it does not make it a contract between the parties. It is simply adjusting the equities between the parties and granting to one or the other certain relief to which litigants may be entitled, provided one or the other complies with certain directions given by the court in order to properly administer equity and effect justice. Equity decrees in this respect are numerous. (Citations omitted.)

Mason v. Ellison, 160 P.2d 326, (Ariz., 1945). See Seeger v. Odell, 115 P.2d 977 (Cal., 1941); Strain v. Security Title Insurance Co., 268 P.2d 167, 170 (Cal. App., 1954). ("In imposing a condition, a court of equity is not bound down to the strict legal rights of the parties, but will take into consideration all the circumstances in order to arrive at the justice of the case.")

Moreover, the stay of execution on Taylor National's judgment combined with the provision that Taylor National may execute on JBC's judgment over against third party defendants is in conformance with a further important principle of equity:

As a general principle where the prejudicial situation has resulted from the wrongful act of the third person, the decision must be against the party whose conduct made possible the wrongdoer's act, breach of trust, fraud, or negligence.

C. The Stay of Execution is Proper Under the Principales That the Party Whose Conduct Caused a Loss Should Bear The Burden of That Loss.

27 Am. Jur. 2d, Equity, Section 147, at 683.

This principal was applied by the Utah Supreme Court in G. Eugene England Foundation v. Smith's Food King No. 6, 542 P.2d 753 (Utah 1975), a case very similar to the instant. The defendant Smith's Food King leased store space in a building owned by the plaintiff Foundation, who subsequently traded the property to First Federal Corporation for stock. Smith's was instructed by the Foundation to thereafter pay its rents to the new title holder, First Federal, which it did. A year later the Foundation sought rescission of the conveyance to First Federal under federal securities law, and some months after filing suit notified Smith's of the litigation and demanded that defendant pay all future rentals to the Foundation. Smith's continued to pay rent to First Federal, and the Foundation filed the instant suit against Smith's claiming all rents paid by the defendant to First Federal after the demand was made.

In the meantime, the Federal District Court found in favor of the Foundation in the original action against First Federal, ordering that the conveyance be rescinded as of the date it occurred and giving the Foundation judgment for all rents received from Smith's by First Federal from the date of the conveyance. The Foundation was unable to collect its judgment against First Federal, and pursued its state court action against Smith's which resulted in summary judgment in Smith's favor.

On appeal the Foundation argued that Smith's should not have continued to pay rent to First Federal after the Foundation's demand, and should be required to reimburse the Foundation, whose ownership rights had now been retroactively re-established, for money paid to First Federal which the plaintiff had been unable to collect. The Supreme Court disagreed:

It may be unfortunate that the Foundation cannot collect its judgment for the rentals against First Federal Corporation. But the fact that the latter cannot pay the judgment should not be held against nor adversely affect Smith's, who have paid their full rentals and now are sought to be charged the second time. There is another doctrine involved in the administration of justice which bears upon the situation here and harmonizes with the decision of the trial court: where one of two innocent parties must suffer a loss because of misconduct of the third (First Federal Corporation), the law generally leans toward placing the loss upon the one who made the choice and created the circumstances out of which the loss came about. It was [the Foundation] who chose to get involved with First Federal Corporation and the trouble that emanated therefrom.

Fed. at 755.

Under the circumstances of the instant case, JBC had a right to depend on Taylor National's fulfillment of its fiduciary duty to represent JBC and protect its interests in this transaction. Taylor National's chose not to do so, resulting in the third party defendant Leon Harward wrongfully appropriating the commission which was due Taylor National. Like Smith's Food King in the England Foundation case, JBC, an innocent party, should not be faced with

suffering the potential burden of paying its obligations twice; and the Court's stay of execution effectively puts the burden of any failure to recover the commission paid to Harward on Taylor National, the party whose failure to act resulted in the commission being paid to the wrong party initially.

Thus the Court's judgment results in justice being done among the parties and is based on recognized equitable principles. Taylor National has produced no authority which impugns the Court's power to fashion such a remedy.

POINT III

A JUDGMENT WHOSE EXECUTION IS PERMANENTLY
ENJOINED DOES NOT BECOME A LIEN ON REAL
PROPERTY OF THE JUDGMENT DEBTOR.

Taylor National urges that under the provisions of U.C.A., Section 78-22-1, once the judgment in the instant case is docketed it becomes a lien against JBC's real property by action of law, and that this result is not subject to abrogation by the Court. As to the great majority of judgments, which are due and payable when such judgments are docketed, this contention is undoubtedly true. However, in the instant case, because of the prohibition against execution imposed by the Court as part of the judgment, the "judgment debtor" does not become liable to the plaintiff on docketing of this particular judgment, and the lien, therefore, would be inappropriate. Furthermore, it would harm JBC's interest contrary to the court's intent of assisting Taylor National

to recover its commissioun while at the same time protecting JBC from having to pay the same real estate commission twice.

A similar result was reached in an analogous situation in Moniz v. Moniz, 299 P.2d 329 (Cal. App., 1956), where in a previous divorce action the wife had received a judgment in her favor representing her share of the marital property to be paid to her in installments. Her former husband, the judgment debtor, complained that the abstract of judgment filed with the clerk represented in part amounts not yet due under the judgment, and, therefore, unjustifiably encumbered his real property to that extent. The Court noted that:

A judgment which provides for payment in installments does not when recorded create a lien, at least as to amounts not due, unless such lien is impressed by the terms of the judgment itself, because there would be no clear way for the debtor to relieve his property of the lien without paying the entire amount. Yager v. Yager, 60 P.2d 422; Bird v. Murphy, 256 P 258. (Emphasis added.)

Id. at 332. See Boyle v. Baggs, 350 P.2d 622 (Utah 1960).

Likewise, in the instant case, a lien to secure payment of an obligation cannot be created on the defendant's property by the filing of a judgment representing a debt to Taylor National which it is not obliged to pay. As in Moniz, supra, even though no obligation to pay the judgment was yet in existence, in order to clear the lien the entire sum would have to be paid. The unconditional judgment suggested by Taylor National would be a substantial burden on JBC's business of building and selling homes and would effectively nullify the court's prohibition against execution,

-16-

i.e., in order to carry on its business operation JBC would have to pay the judgment amount to Taylor National contrary to the intent and ruling of the court.

The trial court's equitable limitations on the judgment are further supported by the rule cited in 46 Am. Jur. 2d, Judgments §242 that:

Not every judgment operates as a lien, and this is true even though the judgment directs the payment of money. . . . [T]o operate as a lien, a judgment must be one which is final and conclusive of the matters in controversy between the parties, and which carries with it the right to issue execution enforceable against the property alleged to be subject to the lien of the judgment. (Footnote omitted.)

In addition, 49 C.J.S., Judgment §504 notes that "[a] perpetual injunction against the collection of a judgment will destroy its lien." In the instant case, the court in effect did permanently enjoin collection of the judgment against JBC. Of course, the judgment was given in the first place only in an effort to provide a remedy to Taylor National as against Harward even though Taylor National had failed to join Harward in the suit. Taylor National now asks this Court to grant it precisely what the trial court refused to do, i.e., make JBC pay a second commission when Taylor National had by its negligence and wilful refusal to deal with Harward caused the first commission to be diverted.

The trial court's ability to prevent the judgment against JBC from having the effect of a lien finds further foundation where equitable estoppel has been pleaded (R. 13) and factually

determined by the court to exist (R. 289, Finding of Fact No. 12). As the Kansas Supreme Court stated in City of Chetopa v. Board of County Commissioners of Labette County, 133 P.2d 174, 177 (Kan. 1943) (citing 19 Am. Jr. §41, p. 6400):

Generally speaking . . . equitable estoppel is a rule of justice which in its proper field prevails over all other rules. It is a rule of last resort, but when it is aroused into activity, it stays the operation of other rules which have not run their course, when to allow them to proceed further would be a greater wrong than to enjoin them permanently. It may, in proper cases, operate to cut off a right or privilege conferred by statute or even by the Constitution. (Emphasis Added.)

The trial court's ruling prohibiting judgment against JBC from taking effect as a lien was thus a fair and proper resolution of the controversy before it and the court acted within its discretion under the equities of the case. Nothing in UCA, Section 78-22-1 requires a contrary conclusion and the court's judgment should be upheld.

POINT IV

IF THAT PORTION OF THE JUDGMENT OF THE TRIAL COURT STAYING EXECUTION AGAINST JBC AND PREVENTING THE JUDGMENT FROM BECOMING A LIEN ON JBC'S PROPERTY CANNOT BE UPHELD, THE JUDGMENT AGAINST JBC SHOULD BE REVERSED.

If this Court determines that the lower court did not have the power to permanently stay execution on Taylor National's judgment against JBC as to prevent said judgment from becoming a lien on JBC's property, then the lower court's

entire judgment against JBC and in favor of Taylor National should be reversed on the grounds that an unconditional judgment against JBC would be fatally inconsistent with the lower court's Findings of Fact. See Parrott Bros. Co. v. Ogden City, 167 P. 807, (Utah 1917).

The lower court made the following Findings of Fact which are controlling on this issue:

9. Plaintiff as listing realtor to JBC and its fiduciary failed to take reasonable and necessary measures to protect its real estate commission as against third party defendant Leon Harward and Continental Value Realty.

* * *

11. Defendant JBC paid the six percent real estate commission in good faith at time of closing, believing it had fulfilled its obligations in accordance with the Earnest Money Agreement.

12. Plaintiff, in failing to exercise its responsibilities as fiduciary to defendant JBC in equity and in good conscience, has waived and is otherwise estopped from recovery of its second real estate commission against defendant JBC or from recovery of an attorney's fee against JBC incident to collection of any sales commission owing to plaintiff, except as may be recovered through JBC from third party defendants Harward, Harrison and Soule.

R. 289-90, Findings of Fact Nos. 9, 11 and 12. See Pryor v. Pryor, 168 P.2d 875, 877, (Okla. 1946) ("[W]here the separate or special findings as to the facts are contrary to final conclusion of judgment, . . . the findings of fact must control. . . .").

Thus, the lower court's Findings of Fact, which have not been controverted on this appeal, establish that, as

between plaintiff and third party defendants, plaintiff was more entitled to receive a commission. However, as between plaintiff and defendant, the defendant was not liable for a commission to plaintiff on grounds of waiver and estoppel due to the plaintiff's breach of its duties to JBC under the listing contract.

The relevant Conclusions of Law (R. 295, Conclusion of Law No. 4) and Paragraph 1 of the Court's Amended Judgment (R. 299) show that in conformance with its Findings of Fact, the Court, based on considerations of equity, absolutely precluded the plaintiff's ability to execute on its judgment. For this Court to create a judgment against JBC absolute in nature, as the plaintiff has requested in this appeal, would result in a judgment that would be the clear antithesis in every respect to the Findings of Fact, Conclusions, and present judgment of the trial court.

In addition, such a result would be contrary to the prior decision of this court in England Foundation, supra, discussed at Point II, a case substantially on point with the instant case. If this Court should determine the present judgment is inappropriate as framed, then it should reverse the judgment against JBC on the basis of the lower court's Findings of Fact or in the alternative vacate the judgment and return it to the lower court for further proceedings in accordance with its Findings of Fact and Conclusions of Law. See Parrott Bros. Co., supra; Bailey v. Murdock, 421 P.2d 639, 644 (Okla. 1966).

It may be argued that if such a decision is made, then Taylor National will have no recovery against anyone, including Harward and Continental Value Realty. If this is so, the plaintiff has only itself to blame. The plaintiff could have, had it chosen to, joined third-party defendants as co-defendants with JBC on any of several theories, including conversion of property. However, for reasons of its own it chose not to, and JBC should not have to suffer for that decision and thus be required to pay a double commission because of Taylor National's earlier breaches under the listing agreement.

POINT V

THE TRIAL COURT HAS DISCRETION TO DENY ATTORNEYS' FEES TO TAYLOR NATIONAL BECAUSE TAYLOR NATIONAL BREACHED ITS FIDUCIARY OBLIGATIONS UNDER THE CONTRACT.

The plaintiff contends that the Court's recognition of the validity of the listing agreement between Taylor National and JBC to the extent of awarding Taylor National judgment on its claim for commission in this matter compels the Court to award the plaintiff attorneys' fees under the attorneys' fee provision of that contract. The Court notes in its decision, however, that its determination not to award attorneys' fees to the plaintiff is based on the fact that the plaintiffs' breach of fiduciary duty in this situation was the proximate cause of its incurring attorneys' fees in this action. As discussed in Point I, supra, in an action such as the instant case involving equitable defenses and considerations, the

Court has great latitude in shaping its remedy, and under the circumstances its decision not to award attorneys' fees is just and equitable.

Further, in Utah attorneys' fees must be awarded only to a party who fully prevails in an action. For example, in Fireman's Insurance Company v. Brown, 529 P.2d 412 (Utah, 1974), the vendor under a real estate contract attempted to foreclose on a purchaser who had failed to make the required monthly payments for over a year, but who at the end of such time had made a proper tender of the amount due which was improperly refused. The Court found in favor of the defendant. Although the contract between the parties provided for the award of attorneys' fees to the prevailing party, the Court refused to award them to the defendant because both parties had been at fault:

Since the buyer had been in default for twenty months, and the seller refused to convey on proper tender, there was good reason to make no award of attorney's fees to either side.

Id. at 420.

Likewise, in Amoss v. Bennion, 420 P.2d 47 (Utah, 1966), the Court entered a judgment of specific performance on a real estate contract for the plaintiff purchaser. The Supreme Court affirmed the lower court's decision, but held that the purchase price should be adjusted in favor of the defendant. The Court concluded that because both sides prevailed on some of their contentions, attorney's fees should be awarded to neither. See Fullmer v. Blood, 546

P.2d 606 (Utah, 1976).

In the instant case, although Taylor National prevailed in its contention that it was owed a commission under the listing agreement with JBC, the defendant JBC prevailed in its contention that Taylor National had breached its fiduciary duty to JBC under the same agreement and was thus estopped from collecting a second commission from JBC. See R. 13, Ninth Defense; R. 259, Finding of Fact No. 12. Under such circumstances, the Court was well within its discretion in refusing to award attorneys' fees to the plaintiff.

CONCLUSION

In the instant case the Court was faced with the complex task of adjusting the legal rights and equities among several parties. The Amended Judgment adequately implements the Court's Findings of Fact and Conclusions of Law in this matter and is in conformance with applicable law. The judgment should, therefore, be upheld by the Court. If the Court feels that the judgment cannot be upheld with its equitable limitations, then based on the lower court's Findings of Fact, the judgment against JBC should be reversed in order to effectively implement the court's decision or, in the alternative, the judgment should be vacated and returned to the trial court for further proceedings in accordance with its own findings.

DATED this 24th day of October, 1980.

Respectfully submitted,

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MAILING CERTIFICATE

I hereby certify that on the 24th day of October, 1980,
I personally mailed two (2) copies of the foregoing Brief of
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