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Frank L. Stewart v. Arnold Lesin : Brief of Plaintiff and Appellant

Utah Supreme Court

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In the Supreme Court of the State of Utah

FRANK L. STEWART,

Plaintiff and Appellant,

—vs.—

ARNOLD LESIN,

Defendant and Respondent.

Case No. 8491

BRIEF OF PLAINTIFF AND APPELLANT

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CASES CITED

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STATEMENT OF FACTS

Plaintiff is a licensed real estate broker doing business at Fillmore, Utah. Defendant was a dealer in new and used Chrysler and Plymouth cars, operating an agency, sales office and repair shop in a building at Fillmore, Utah, and desired to sell the building and business.

On April 22, 1952 a listing agreement designated as a "Sales Contract" (R.3) was executed, authorizing plaintiff to sell the building and ground, tools and inventory for "approximately $88,000.00." The agreement provided that the defendant would pay to plaintiff "5% of the above sale price or such other sale price as I may agree to accept, immediately a sale or exchange is effected, ..."

Plaintiff then endeavored to find a purchaser, contacted prospects and advertised the property. As a result, he came in contact with Mr. Lorin Peck of Salt Lake City, Utah, who expressed an interest in the property and business. Mr. Peck was taken to Fillmore, where he examined the property and toured the community. He there discussed the business generally with both plaintiff and defendant and went over the equipment, parts, books and records with the defendant, Mr. Lesin. (R. 19). Several trips were made and the properties inspected, and finally the general terms of the sale were settled by the agreed exchange of certain properties. On or about September 18, 1952 the defendant came to Salt Lake City with the plaintiff and they met with the prospective purchaser at his home.

After discussions, the defendant, as seller, and Mr. Peck, as buyer, asked the plaintiff to type up a contract for the sale or trade of the properties. (R. 21 and 22). This document was then prepared in their presence and signed by all three there on September 18, 1952 as the "Contract of Sale or Trade." (R. 4). The buyer then paid to the defendant, as seller, the sum of $2,000.00.

As provided by the Contract, the parties met together the next day to "complete the transfer of the above listed property." Attorneys representing buyer and seller were requested to check abstracts and to prepare the necessary documents to complete the deal. Mr. Peck, at this point, insisted that the defendant guaranty to him the Chrysler-Plymouth agency. No guaranty was or could be made thereon as the buyer had been previously advised by both plaintiff and defendant. (R. 36, 38, and Page 22 of Lesin deposition).

The buyer and seller never completed the transaction and the buyer demanded back his $2000.00 which was refused by defendant. The buyer, Lorin Peck, then sued the defendant, Arnold Lesin, for recovery of the $2000.00 in case #97736 in the District Court, in and for Salt Lake County, Utah. The complaint (R. 85) was answered by defendant (R. 94), wherein defendant claimed that the agreement of September 18, 1952 (supra) was binding and that the defendant was ready, willing and able to perform and he demanded damages in the amount of $3874.40. Trial was had and completed and the Court on February 5, 1954 found that the contract executed September 18, 1952 (supra) was partly in writing and partly oral and that defendant had breached his oral promise to obtain a franchise for the sale of Chryslers and Plymouths, (R. 110, 111), and judgment was entered for return of the $2000.00 deposit. (R. 112).

Plaintiff is here suing for his commission on the transaction on the basis that he has fully performed his obligations as a broker when he brought together a will-

ing seller and a willing buyer and the parties contracted for the sale and exchange of properties on September 18, 1952.

The defendant did not personally appear at the trial to testify but was represented by counsel. His only testimony in the record is a part of the deposition which he gave in the prior trial between Mr. Peck and the defendant.

The buyer and seller agreed to the valuation of the properties that were to be exchanged at $88,000.00. (R. 81).

At the conclusion of the present case, the trial court announced his conclusion and judgment "that there was no sale and that the defendant may have judgment for no cause of action." (R. 75). Thereafter, Findings of Fact, Conclusions and Judgment adverse to plaintiff's claim to a commission for his services as broker in the transaction. (R. 78-80).

STATEMENT OF POINTS

POINT I

THAT THE COURT ERRED IN FINDING THAT THE PLAINTIFF FAILED TO SELL THE PROPERTY UPON TERMS ACCEPTED BY THE DEFENDANT.

POINT II

THAT THE COURT ERRED IN FINDING THAT THE PLAINTIFF FAILED TO OBTAIN A PURCHASER FOR THE PROPERTY WHO WAS READY, ABLE AND WILLING TO PURCHASE SAID PROPERTY UPON THE TERMS SET FORTH IN THE LISTING CONTRACT OR UPON ANY OTHER TERMS ACCEPTABLE TO THE DEFENDANT.

POINT III

THAT THE QUESTION OF A COMPLETE AGREEMENT FOR EXCHANGE OF PROPERTIES BETWEEN DEFENDANT AND THE PROSPECTIVE BUYER WAS RES JUDICATA.

POINT IV

THAT PLAINTIFF IS ENTITLED TO JUDGMENT FOR THE SUM OF $4,400.00, BEING 5% OF THE AGREED VALUE OF $88,000.00 FOR THE PROPERTIES THAT WERE TO BE EXCHANGED.

ARGUMENT

POINT I

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It is the position of the plaintiff that his duties and responsibilities ceased when he had brought together a buyer and seller and they had executed their written Contract of Sale or Trade (R. 4) and the buyer paid to the seller $2000.00 to bind the transaction.

The measure of what he must do as a broker to earn his commission is found in the written "Sales Contract" (R. 3) wherein it is recited that a 5% commission shall be paid on the "above sale price or such other sale price as I may agree to accept, immediately a sale or exchange is effected . . . ." The buyer and seller agreed to exchange properties based upon an agreed

sum of $88,000.00 and agreed to meet the next day and transfer the listed properties.

Is the broker to be denied his commission because the seller fails to perform the contract he has made with the prospective buyer? Such is the effect of the decision in this case. The defendant has had two turns in court on the same basic question. When the buyer sued to get his down payment back, the court found that such must be returned because the defendant failed to perform the acts upon which the contract of sale was conditioned. (R. 111) Now the defendant has switched positions and to get out of paying a commission, he denies that he agreed to sell the properties to the said buyer.

The matter is akin to the situation where a real estate broker brings together a prospective buyer and seller and an earnest money receipt is executed. Then the seller either changes his mind or the title to his property is defective so no sale is completed. The broker has already earned his commission notwithstanding his client's failure to complete the deal and deliver a good marketable title.

Cases dealing with the matter have been decided by this court generally in favor of the broker. We submit that the following decisions are in point:

Hoyt v. Wasatch Homes, Inc., 1 Utah (2d) 9, 261 Pac. (2d) 927. The issues revolved around the real estate broker's right to the stated 5% commission on the sale of lots. $1000.00 was paid on the execution of the earnest money receipt and agreement. That offer of purchase was accepted by the owner and the down pay-

ment was held by the broker. Thereafter negotiations on the sale continued until the parties abandoned the deal. The trial court denied recovery to the broker but the Supreme Court reversed it, and ordered entry of judgment in favor of the broker for the full 5% commission.

In part, the decision of this Court said:

> "That agreement certainly contemplated that the plaintiff would cooperate in good faith toward the accomplishments of the purpose for which he employed defendant. He cannot be permitted to procure them to obtain a buyer, on terms accepted by the plaintiff, and then prevent the accomplishment of what he requested and authorized them to do by arbitrarily refusing to perform his part of the transaction. Under such circumstances, he will not be heard to complain of their failure to do that which he prevented."

Soon after the Hoyt decision, this Court handed down Curtis v. Mortensen, 1 Utah 354, 267 Pac. (2d) 237 (March 1954). The customary listing agreement was executed by defendants in favor of the plaintiff as a real estate broker to authorize sale of a motel and payment of a 5% commission for such services. A purchaser was found and an earnest money receipt and agreement signed. $5000.00 was on deposit with the broker to bind the transaction. The owners consulted their attorney and upon finding that the acceptance by purchasers of the offer of sale was still conditional, rescinded the contract. Purchasers then came to Utah and unsuccessfully endeavored to enforce specific performance by legal proceedings. In this action for the real estate broker's com-

mission, once again the District Court denied recovery but the Supreme Court reversed such decision. The opinion provided in part:

> "The proposed purchasers were anxious to buy the property even after respondents' rescission of the earnest money agreement. Their suit for specific performance is ample proof of that fact. There can be no question about their willingness to buy and it was stipulated that they had the financial ability to consummate the sale. The sale was never consummated because respondents changed their minds and refused to sell and not because the buyers refused to make a binding agreement. Under such circumstances appellants have fulfilled their part of the listing agreement by having produced purchasers who were ready, willing and able to buy the listed property and are entitled to their commission. Such were the terms of the listing agreement made by the parties. There was no requirement that a binding contract be entered into and for us to add that requirement would be to make a new contract for them. This we may not do. As stated in 8 Am. Jur. Sec. 184, page 1097:
>
> " 'Once the broker has procured a person who is able, ready and willing to purchase on the terms offered by the owner, he is entitled to commissions, even though the failure to complete the contract is due to the default or refusal of the employer.'
>
> "This court in Little and Little v. Fleishman, 35 Utah 566, on page 568, 101 P. 984, on page 984, 24 L.R.A., N.S., 1182, indicated it was in accord with the above statement, even though it was unnecessary to a decision of that case since

a binding offer had been obtained by the owner, by saying:

> " ' ***The substantial features of the agreement between plaintiffs and the defendant are that the plaintiffs were employed to effect, not consummate, a sale, and were entitled to a commission in the event of a sale at any price agreed upon. When the plaintiff obtained and produced a purchaser who was able, ready, and willing to purchase for the price, and on the terms proposed they did all that was required of them, and the owner could not, under the terms of his contract with them, arbitrarily refuse to sell and decline to enter into negotiations of a sale with the proposed purchaser without becoming liable to plaintiffs for their commission.*** ' "

The defendant absented himself from the trial, apparently realizing that to do otherwise he must contradict the testimony given at the earlier trial between him and the buyer. The defense semed to be based upon some theory that the plaintiff here, Mr. Stewart, as broker, had interposed the condition that the Chrysler-Plymouth agency was a part of the deal. However, our plaintiff specifically testified that the prospective buyer had been taken to Fillmore and advised by him and the defendant that the agency could not be sold (R. 36 & 38). The same testimony is found in the defendant's testimony at page 22 of his deposition.

Thus the defendant has taken two diametrically opposed positions to best further his plan; first to keep the down payment on the theory that a complete contract had been made with the buyer and now, that no contract

has been made, so he will not have to pay the commission.

A broker has no obligation to guarantee the ultimate good faith and performance of the parties to the buy and sell agreement. Here the buyer and seller dealt with each other at arms length. Each was an experienced business man. Inspections of properties were made and they bargained back and forth. Then these mature men made a deal. So no delay would intervene, they insisted that the plaintiff, as broker, sit down at the buyer's home in their presence and type up the items so agreed upon. To bind the sale and exchange, they then read and signed the agreement and $2000.00 was paid to the defendant.

Prior negotiations, questions and representations of the parties were merged into their "Contract of Sale or Trade" on September 18, 1952. The broker's duties had been performed and his commission earned. At this stage the broker had brought together two experienced businessmen and had produced for his client a buyer who was ready, able and willing to complete the transaction. Mr. Peck, the prospective buyer, testified that as of the date of the agreement, he was worth $100,000.00. (R. 64).

POINT III

THAT THE QUESTION OF A COMPLETE AGREEMENT FOR EXCHANGE OF PROPERTIES BETWEEN DEFENDANT AND THE PROSPECTIVE BUYER WAS RES JUDICATA.

The basic principle of the rule of res judicata is that matters once at issued be set at rest and further that parties be not permitted to vascillate between positions after a judicial determination.

The prior case here involved is Civil No. 97736 between Lorin Peck, the buyer and Arnold Lesin, the seller. The issue was whether or not the $2000.00 earnest money should be returned. This revolved around the question of whether the plaintiff or the defendant breached the contract of sale or trade. The same basic contract dated September 18, 1952 as signed by the parties was in evidence and at issue.

The District Court in and for Salt Lake County through Judge Joseph G. Jeppson tried the case without a jury and made the Findings and Judgment (Tr. 110, 111, 112). These findings included these determinations among others:

> "1. On September 18, 1952, plaintiff and defendant entered into an agreement, partly oral and partly in writing, providing that plaintiff would trade to defendant certain property together with $15,000.00 in cash for a certain business of the defendant known as the Lesin Motor Company.
>
> "2. Said promise of plaintiff to pay said $15,000.00 and transfer said property to the defendant was conditioned upon the defendant's obtaining for the plaintiff the franchise for the sale of new Chrysler and Plymouth automobiles at Fillmore, Utah, and this condition was known to and understood by both plaintiff and defendant.
>
> "6. Plaintiff fully complied with all the terms of said conditional contract, but defendant failed, as aforesaid, to perform the acts upon which said contract was conditioned."

By applying the stated findings to our instant case, it is obvious that the broker had completed his work; had

brought together a willing seller and a willing and able buyer, but the seller had then breached the basic condition of the transaction.

The cases cited above confirm the broker's right to judgment for his commission upon such state of affairs.

POINT IV

THAT PLAINTIFF IS ENTITLED TO JUDGMENT FOR THE SUM OF $4,400.00, BEING 5% OF THE AGREED VALUE OF $88,000.00 FOR THE PROPERTIES THAT WERE TO BE EXCHANGED.

The preceding points clearly demonstrate that the plaintiff as a licensed broker had earned his commission. The amount of the commission was agreed to be 5% of such sales price or exchange price as the seller "may agree to accept." The exhibits in this case and the testimony of the prospective buyer (R. 65) establish the agreed basis of sale and exchange at $88,000.00. The commission to which plaintiff is entitled is $4400.00 and judgment for such sum should be entered.

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