1981

William G. Vandever & Company v. Jerry B. Black, DDS; 0. Brent Black, DDS; Randy R. Black, DDS and Robert H. M. Killpack, DDS : Appellant's Brief

Utah Supreme Court

IN THE SUPREME COURT

OF THE STATE OF UTAH

WILLIAM G. VANDEVER & COMPANY	)	
Plaintiff-Appellant,	)	
vs	)	Case No. 17608
JERRY B. BLACK, DDS; O. BRENT BLACK, DDS; RANDY R. BLACK, DDS and ROBERT H. M. KILLPACK, DDS,	)	
Defendants-Respondents.	)	

APPELLANT'S BRIEF

APPEAL FROM THIRD JUDICIAL
DISTRICT COURT OF SALT LAKE COUNTY,
THE HONORABLE PETER F. LEARY, JUDGE

HANSON, RUSSON, HANSON & DUNN
LEONARD H. RUSSON
BRUCE L. RICHARDS
175 South West Temple, Suite 650
Salt Lake City, Utah 84101
Attorneys for Plaintiff-Appellant

DAVID E. WEST
1300 Interstate Bank Building
Salt Lake City, Utah 84111
Attorney for Defendants-Respondents.

TABLE OF CONTENTS

Cases Cited

Other Authorities Cited

IN THE SUPREME COURT OF THE STATE OF UTAH

WILLIAM G. VANDEVER & COMPANY	:	
Plaintiff-Appellant,	:	
vs.	:	
JERRY B. BLACK, DDS; O. BRENT BLACK, DDS; RANDY R. BLACK, DDS; and ROBERT H. M. KILLPACK, DDS,	:	
Defendants-Respondents.	:	Case No. 17608

APPELLANT'S BRIEF

STATEMENT OF THE NATURE OF CASE

This is a contract action wherein the plaintiff and appellant sought to recover its fee for services rendered pursuant to a written contract. The defendants and respondents brought a Counterclaim against the plaintiff for recovery of a good faith deposit paid pursuant to the contract.

DISPOSITION IN THE LOWER COURT

This case was tried without a jury to the Honorable Peter F. Leary, District Judge of the Third Judicial District, on the Complaint of the plaintiff and the Answer and Counterclaim of the defendants. The court heard testimony of the parties and various other witnesses and received a Memorandum filed by the plaintiff. The court entered a Judgment of no cause of action in favor of the defendants on plaintiff's

Complaint. Further, the court entered a Judgment in favor of the defendants on the defendants' Counterclaim. The plaintiff filed a Motion for New Trial and a Motion to Amend Findings of Fact and Conclusions of Law and Judgment, and filed a Memorandum in Support Thereof. Following oral argument, the court denied the plaintiff's Motion.

RELIEF SOUGHT ON APPEAL

The plaintiff seeks to have the Judgment reversed as to the dismissal of the plaintiff's Complaint and the award of damages, interest and costs on the defendants' Counterclaim. In the event the plaintiff is not found entitled to a reversal of the dismissal of the plaintiff's Complaint, the plaintiff seeks a reversal of the Judgment in favor of the defendants on the Counterclaim. In the alternative, the plaintiff seeks a new trial.

STATEMENT OF FACTS

The plaintiff, William G. Vandever & Company, is a corporation engaged in the business of locating and negotiating commercial financing. The defendants are four dentists who entered into an arrangement to develop a medical office complex in Salt Lake City. (Tr 13)

The plaintiff and the defendants are the parties to a written agreement known as an "Authorization to Obtain Financing." (Exhibit 3P, Tr 18) Pursuant to this Authorization

to Obtain Financing, the plaintiff was employed to make applications on behalf of the defendants for financing a doctors' office complex. (Paragraph 1 of Exhibit 3P) As consideration for the plaintiff's services in negotiating the financing, the plaintiff was to receive 4 percent of the total amount of any loan commitment payable at the time of issuance of the commitment. (Paragraph 7 of Exhibit 3P) The Authorization, as pertinent to this appeal, was for financing "...for such other amounts and/or terms as may be acceptable to the parties." (Paragraph 2 of Exhibit 3P)

The defendants, prior to employing the plaintiff, had attempted unsuccessfully to obtain financing on their own. (Tr 14) At the initial meeting between the plaintiff and the defendant's spokesman, Dr. Jerry Black, the plaintiff delivered a checklist of items required for the preparation of a loan package. Among other things, this checklist required that an appraisal or feasibility study be provided by the defendants. This checklist also noted the possibility that a loan commitment would be issued subject to an appraisal if the appraisal was not provided. (Paragraph 17 of Exhibit 2P)

A tentative commitment from American United Life Insurance Company (hereinafter referred to as the "Insurance Company") for $375,000 in financing at 10¼% interest of a 20-year term and a 25-year amortization was obtained by the plaintiff on behalf of the defendants. (Tr 20 and Exhibits 5P and 6P)

The defendants accepted the tentative commitment. (Tr 21 and Exhibit 7P) The defendants also sent deposits to the Insurance Company as part of the good faith deposit. (Tr 21 and Exhibit 8P) The letter of acceptance requested urgent attention to the financing sought by the defendants. (Exhibit 7P)

The Insurance Company issued a loan commitment dated January 16, 1979, to the defendants. (Tr 22 and Exhibit 9P) This commitment was a standard real estate loan commitment and included the terms which had been accepted by the defendants. As had been set forth in the checklist of information, the loan amount was limited to "an amount not exceeding 75% of the appraised value of the property as reflected by the appraisal herein required." (Exhibit 9P)

Following receipt of the loan commitment, appraisers were contacted by the defendants with regard to completing the appraisal. The credentials of Mr. Raymond Fletcher, the appraiser selected by the defendants, were submitted to and approved by the Insurance Company. (Tr 25 and Exhibit 11P) Nothing had prevented the defendants from obtaining the appraisal prior to receipt of the commitment. (Tr 54 and 55)

One of the defendants, Robert H. M. Killpack, was not in the country. (Tr 60) Mr. Boyd Jensen acted on behalf of Dr. Killpack. (Tr 60) Mr. Jensen signed, on behalf of Dr. Killpack, the Authorization to Obtain Financing and the commitment from Insurance Company. (Tr 62 and Exhibit 9P)

Jensen signed the Authorization knowing the maximum amount requested was $397,000. (Tr 66) The commitment was apparently signed contingent on Dr. Killpack's agreement with the transaction. Killpack had informed Jensen that 100% financing of the project was required. (Tr 66) When Jensen contacted Killpack, he informed Killpack that there was no guarantee that the financing was to be 100%. Upon Jensen's representations that 100% financing was not guaranteed, the proposal was rejected. (Tr 66)

Upon receipt of the commitment of the Insurance Company, the plaintiff took steps with regard to obtaining construction financing for the defendants. (Tr 81-82) The efforts regarding construction financing were stopped when Mr. H. P. Merritt, the Regional Vice-President for the plaintiff, was informed by Dr. Black that the defendants would not go through with the loan commitment. (Tr 82)

On February 22, 1979, the Authorization to Obtain Financing was cancelled effective 10 days thereafter. (Tr22-23 and Exhibit 12P) The defendants paid only $3,000 of the total $15,000 fee.

ARGUMENT

POINT I.

THE PLAINTIFF FULLY PERFORMED ITS CONTRACTUAL OBLIGATIONS. THE PLAINTIFF IS THEREFORE ENTITLED TO RECOVER ITS FEE FOR ITS SERVICES.

The "Authorization to Obtain Financing" obligated the plaintiff to make applications for financing on behalf of the

defendant. (Paragraph 1 of Exhibit 3P) As pertinent to this action, the defendants authorized the plaintiff to make application for financing ". . .for such other amounts and/or terms as may be acceptable to the parties." (Paragraph 2 of Exhibit 3P) The plaintiff was to be compensated for its services in negotiating the financing. The compensation was due at the time the loan commitment was issued to the defendants. (Paragraph 7 of Exhibit 3P)

The plaintiff fully performed its contractual commitment by delivering the tentative bid of the Insurance Company which was accepted by the defendants and for which the defendants paid a 1% good faith deposit and by subsequently delivering the final commitment of the Insurance Company and by remaining willing to conduct further negotiations for the defendants. The defendants by not reaching agreement among themselves or by subjectively disagreeing with the commitment cannot avoid their contractual obligations. These "defenses" are discussed throughout the remainder of this Brief.

POINT II.

THE DEFENDANTS CANNOT AVOID THEIR OBLIGATION TO THE PLAINTIFF BECAUSE THEY DID NOT UTILIZE THE FINANCING OF THE INSURANCE COMPANY.

The law does not require that a binding contract actually be entered into as a condition to recovery of a fee for services. It is immaterial whether the defendants actually entered into an agreement with the Insurance Company.

In Curtis v. Mortensen, 1 Utah2d 354, 267 P2d 237 (1954), the plaintiff brokers had a listing agreement with the defendant entitling the plaintiffs to a commission upon providing a "ready, willing and able buyer." An "earnest money agreement" was entered into by the defendant-seller and prospective buyers. The "earnest money agreement" was subject to the approval of the buyers and contained other conditions. Upon learning that the "earnest money agreement" was conditional and pursuant to advice of counsel, the defendant-seller rescinded the agreement. The buyers brought an action for specific performance. The court denied specific performance because there had been no consideration paid and because the defendant-seller rescinded the agreement before it was approved by the buyers. This court held that it was immaterial whether the purchasers could enforce the "earnest money agreement." The question was whether the brokers had performed their contractual obligations by finding "ready, willing and able buyers." The court stated:

> . . .under such circumstances appellants have fulfilled their part of the listing agreement by having produced purchasers that were ready, willing and able to buy the listed property and are entitled to their commissions. Such were the terms of the listing agreement made by the parties. There is 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 AmJur, Sec. 184, p. 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.' 267 P2d at 239.

In Curtis, this court cited with approval Little and Little v. Fleishman as follows:

> The substantial features of the agreement between plaintiffs and the defendant are that the plaintiffs were employed to effect, not consumate, a sale, and were entitled to a commission in the event of a sale at any price agreed upon. When the plaintiff obtained and procured a purchaser who was able, ready and willing to purchase for the price, and on the terms proposed, they did all that was required fo 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 the sale with the proposed purchaser without becoming liable to plaintiffs for their commission.

In the present case, the plaintiff was to be compensated for its services in negotiating financing for the defendants. The plaintiff's fee was earned upon the issuance of financing or a loan commitment by the lending institution in accordance with the terms of Paragraph 2 of the Authorization to Obtain Financing. This paragraph required that the terms be acceptable to the parties.

None of the terms of the Authorization to Obtain Financing required that the defendants enter into a binding agreement with any lender. The plaintiff fulfilled its obligations by delivering the loan commitment. As in Curtis, the plaintiff was entitled to recover its fee for its services.

POINT III.

THE DEFENDANTS MUST MAKE A REASONABLE EFFORT TO COMPLETE THE TRANSACTION WITH THE INSURANCE COMPANY. IF THIS EFFORT IS NOT MADE, THE PLAINTIFF IS ENTITLED TO RECOVER ITS FEE FOR ITS SERVICES.

In Hoyt v. Wasatch Homes, 261 P2d 927 (Utah 1953), the plaintiffs entered into a brokerage agreement whereby the defendant broker was to receive a commission for its services. The commission

agreement provided that the commission was payable if the sale was consummated. An "earnest money agreement" was entered into, the terms and conditions of which were subject to adjustment agreeable to both parties. The parties did not agree on two conditions. The parties rescinded the agreement and sued the real estate broker to recover their advance fee. The broker counterclaimed to recover the remainder of the fee due based on the commission which would have been required had a sale been consummated. The court found the brokers were entitled to recover their commission notwithstanding that a transaction had not been consummated. The court stated:

> . . .under such circumstances Hoyt could not, by refusal to cooperate, defeat the defendant's right to its commission. And we say this advisedly, notwithstanding the finding of the trial court, that when Hoyt originally engaged the defendat to sell the property, it was agreed that the commission would be paid only if the sale were consummated.
>
> That agreement certainly contemplated that the plaintiff would cooperate in good faith toward the accomplishment 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. 261 P2d at 930.

In Ferris v. Jennings, 595 P2d 857 (Utah 1979), the plaintiff and the defendant had entered into an oral contract of purchase regarding certain real property. The defendant was to pay the plaintiff a certain amount plus a fair commission. The plaintiff

refused to cooperate in discussing the commission issue. This court, in finding the contract enforceable, stated:

> . . .but to be considered therewith is the further proposition that the parties to a contract are obliged to proceed in good faith to cooperate in performing the contract in accordance with its expressed intent. . . Quite beyond this, one party to a contract cannot by willful act or omission make it impossible or difficult for the other to perform and then invoke the other's nonperformance as a defense. 595 P2d at 859.

In the present situation, the defendants are in substantially the same position as the plaintiffs in Hoyt and Ferris. Assuming arguendo, that the commitment of the Insurance Company was not acceptable to the defendants, this non-acceptability results from the defendants' failure to comply with the appraisal condition of the Authorization to Obtain Financing. If other portions of the commitment were unclear to the defendants, the defendants failed to take any steps to clarify the commitment or to determine precisely what a loan commitment for a commercial real estate project consisted of. The defendants engaged the plaintiff to obtain a lender for them. They cannot avoid their obligation to the plaintiff by arbitratily refusing to cooperate of by making it difficult or impossible for the plaintiff to perform.

POINT IV.

THE COMMITMENT SECURED BY THE PLAINTIFF FOR THE DEFENDANTS WAS "ACCEPTABLE TO THE PARTIES." "ACCEPTABLE" IS DEFINED BY THE USUAL BUSINESS MEANING OF THE WORD AS APPLIED TO THE NATURE OF THE BUSINESS DEALINGS.

In Commercial Credit Company v. Insular Motor Corporation, 17 F2d 896 (1st Cir 1927), the plaintiff entered into an agreement

with the defendant whereby the plaintiff agreed to purchase "acceptable retail time-sales obligations". The defendant argued that the contract lacked mutuality because a subjective interpretation of the term "acceptable" applied. The court rejected this argument, stating:

> Plaintiff's agreement to purchase acceptable time-sales obligations of the customers of the contract dealers is to be given its normal business meaning, bearing in mind that the plaintiff would have a natural business motive to find all such obligations acceptable, if reasonably sound and fit to be handled by such a financing concern. 'Acceptable' does not mean acceptable by whim; it means acceptable within the usual business meaning of the word as applied to this kind of business dealings. Failure or arbitrary refusal by the plaintiff to furnish the banking credit reasonably contemplated by the contract would plainly have been a breach of a legal duty, grounding a valid claim for damages by any dealer this injured. (Emphasis added.) 17 F2d 899-900.

A loan commitment is a commonly utilized agreement in the real estate financing. A loan commitment contains certain terms based on the project, the financial considerations, and the nature of the loan transaction.

Osborne, Nelson and Whitman, Real Estate Finance Law, West Publishing Co. (1979) explains what a loan commitment as utilized in real estate financing is as follows:

> The permanent loan commitment, a promise by a lender to make a long-term loan on the property when construction is completed, is of critical importance. . .as a result of regulatory requirements, internal policies, or both, the great majority of construction lenders will not issue their commitment until a permanent or 'take out' loan commitment has been first obtained.
>
> The permanent loan commitment will usually be based on the same underwriting considerations as the construction line loan: the borrower's credit

> the project's design and technical feasibility, an appraisal of its completed value and marketability, and the satisfaction of various title and other legal requirements. . .
>
> Loan commitments are usually hedged with numerous conditions to protect the lender's interests. . . Other common conditions include submission to the lender of final plans and specifications (if the commitment is issued on the basis of preliminary versions or if the lender has required changes) and submission of other documentation, including the executed construction contract, the documents creating the developer entity (if a corporation, partnership or trust), leases executed by the major tenants, the title insurance report and binder, the permanent loan commitment if a construction loan is being made, the building permit, and perhaps an opinion of counsel respecting the validity of the developers entity's creation, its power to undertake the project, and validity of the other documents.
>
> In a permanent loan commitment on a project to be built, lien-free completion in accordance with the agreed plans and specifications will be made a condition.
>
> The permanent commitment on a rental project, such as an apartment building or office building, may also be conditioned upon some specified fraction of the project being rented. More complex arrangements are sometimes used, so that a portion of the permanent loan will be funded at a given rental level ('floor'), and the remainder on a higher rental level ('ceiling') has been achieved. . . Real Estate Finance Law, Section 12.3, pp. 721-723.

The usual business meaning for a loan commitment for commercial real estate financing includes the terms explained above which were the terms of the Insurance Company's commitment. The Authorization to Obtain Financing obligated the plaintiff to deliver such a loan commitment. The commitment delivered was precisely that required by the contract. Therefore, the plaintiff

met its obligations under the contract. The plaintiff delivered a loan commitment which was acceptable to the parties.

POINT V.

WHEN PERFORMANCE OF A CONTRACT INVOLVES SATISFACTION OF ONE PARTY, AN OBJECTIVE STANDARD OF SATISFACTION APPLIES.

In Haymore v. Levinson, 8 Utah2d 66, 328 P2d 307 (1958), the plaintiff-contractor constructed a house for the defendants pursuant to a contract which required "satisfactory completion." The defendants asserted that they were not satisfied with the construction and that certain items on a list had not been completed. The court distinguished the cases where the undertaking is to do something pleasing to the personal taste, fancy or sensibility of the other party from a second classification of cases where operative fitness, etc. is involved. An objective standard is applied to this second classification of cases. This court stated:

> The other classifications involve satisfaction as to such things as operative fitness, mechanical utility or structural completeness in which the personal sensibilities just mentioned would not reasonably be deemed of such predominant importance to the performance. As to such contracts, rhe better considered view, and the one we adhere to, is that an objective standard should be applied: that is, that the party favored by such a provision has no arbitrary privilege of declining to acknowledge satisfaction and that he cannot withhold approval unless there is apparent some reasonable justification for doing so. 328 P2d at 309.

In W. P. Harland Construction Company v. Utah State Road Commission, 19 Utah2d 364, 431 P2d 972 (1967), the plaintiff claimed that the defendant had refused to approve the use of certain

equipment in a highway construction project. There was no contention that the defendant had agreed to the use of the equipment, but rather that the defendant had refused to allow its use without reason or justification. The court stated the obligation of the defendant as follows:

> . . .However, it is to be conceded that where a contract provides that a matter of approval or satisfaction of a method of operation, or performance of a contract, is reserved to a party, it is to be assumed that he will act fairly and in good faith. It is generally held the he cannot without any reason or excuse, arbitrarily withhold approval, or acknowledgement of satisfaction. 431 P2d at 793.

In Harland, because the defendant's structural engineer had given considerable attention and consideration to the proposed equipment, was familiar with other tests of the equipment and had personally observed the operation of alternative equipment, the court found the defendant had not acted arbitrarily. However, in the present case, the defendants determined that there were several terms of the loan commitment which were personally unacceptable to them. The defendant had not and did not contact any financial institutions or legal counsel (except for Mr. Jensen, who is an attorney) with regard to the loan commitment (as required by Harland They took no steps to determine whether the loan commitment was objectively satisfactory and acceptable.

POINT VI.

THE DEFENDANT'S REFUSAL TO ALLOW THE PLAINTIFF TO CONTINUE NEGOTIATIONS OR SEEK OTHER FINANCING WAS A REPUDIATION TO OBTAIN FINANCING.

Assuming arguendo, that the commitment secured for the defendants was not acceptable to the parties, that the completion of

the appraisal was not the defendants' obligation under the Authorization to Obtain Financing, and that the defendants did not arbitrarily refuse to enter into the agreement, the defendants still had an obligation to allow the plaintiff to continue to perform its obligations under the Authorization to Obtain Financing. The Authorization to Obtain Financing was not effectively cancelled until approximately March 1, 1979. This cancellation came by reason of the letter of the defendants' legal counsel, who recognized that the contract remained in force until that date.

On or about February 7, 1979, the defendants refused to provide the plaintiff with the opportunity to continue negotiations with the Insurance Company or other prospective lenders. They further refused to disclose the concerns they had for the loan commitment. The plaintiff remained willing until the defendants refused to continue to assist the defendants with their search for financing.

In C.R.I. v. Watson, 608 F2d 1137 (8th Circuit 1979), the owner of a shopping center entered into an agreement whereby the plaintiff had the exclusive right to find a corporate buyer of a portion of the shopping center. The agreement was subject to certain other agreements being delivered to and accepted by the defendant.

The defendant notified the plaintiff he wasn't going to go through with the contract. This repudiation made the plaintiff's

performance impossible even though the plaintiff remained ready, able and willing to perform. In finding the broker entitled to recover the commission which it would have received had it produced a buyer, the court stated:

> Watson, (defendant) also challenged the court's finding that, 'by refusing to perform in accordance with the terms of the September 18 contract, Watson made it impossible for C.R.I. to produce a buyer as required. C.R.I., at all times, stood ready, willing and able to produce a buyer, but was prevented from doing so only by Watson's repudiation of the agreement.' Watson's actual arguments do not refute the finding that there was 'reasonable likelihood of (C.R.I.'s)(plaintiff's) ability to produce a buyer,' or that Watson's breach prevented C.R.I. from performing.

The court not only found C.R.I. had made substantial efforts and had up to at least two potential purchasers, but also that C.R.I. i was prepared to purchase. 608 F2d at 1142.

In C.R.I., the broker was allowed to recover its commiss when a repudiation took place before the broker had performed or found any potential buyers. In the present case, the plaintiff had already found at least one potential lender prior to the repudiation of the defendants. Therefore, the plaintiff is entitled to recover its fee. The defendants cannot avoid their contractual duties by repudiating the agreement.

CONCLUSION

The plaintiff was entitled to recover a fee for its services in negotiating financing for the defendants. The plaintif became entitled to this fee upon delivery of a loan commitment. Th plaintiff delivered a tentative and final loan commitment. The

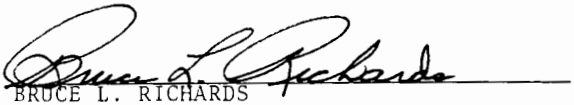
final loan commitment, on an objective basis, was precisely the commitment contemplated by the parties' contract and was acceptable to the parties.

The defendants cannot avoid their obligation to compensate the plaintiff for its services by failing to have an appraisal completed, by refusing to cooperate or making performance difficult or impossible, by failing to agree among themselves, or by repudiating the agreement. The defendants should be required to compensate the plaintiff.

The plaintiff respectfully submits that the District Court's dismissal of the plaintiff's Complaint should be reversed, and judgment for the plaintiff in the amount of $12,000.00 should be entered. Should the plaintiff not be found entitled to a reversal, the plaintiff submits that the judgment on the defendants' Counterclaim should be reversed. In the alternative, the plaintiff submits that a new trial should be granted.

DATED this 31 day of August, 1981.

HANSON, RUSSON, HANSON & DUNN



BRUCE L. RICHARDS
LEONARD H. RUSSON
Attorneys for Plaintiff-Appellant
175 South West Temple, Suite 650
Salt Lake City, UT 84101

DELIVERY CERTIFICATE

I hereby certify that I delivered two (2) copies of the attached Brief to Mr. David E. West, Attorney for Defendants-Respondents, 1300 Interstate Bank Building, Salt Lake City, UT 84111, this 31 day of August, 1981.