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

Utah Supreme Court

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IN THE SUPREME COURT

OF THE

STATE OF UTAH

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

**BRIEF OF RESPONDENTS**

An appeal from a judgment of the
Third District Court of Salt Lake County,
the Hon. Peter F. Leary, Judge


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FILED

AUG 31 1981

Clerk, Supreme Court, Utah



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IN THE SUPREME COURT

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RESPONDENTS' BRIEF ON APPEAL

STATEMENT OF KIND OF CASE

This is an action by plaintiff, a loan broker, to collect a commission for obtaining a loan commitment for defendants.

DISPOSITION IN LOWER COURT

The case was tried to the Court sitting without a jury. The Court entered a judgment of no cause of action, finding that the plaintiff had not earned the claimed commission. The Court awarded defendants' judgment on their counterclaim in the amount of $2,000.00, being the partial return of a good faith deposit paid by the defendants to the plaintiff.

RELIEF SOUGHT ON APPEAL

Defendants and respondents seek to have the judgment of the lower court affirmed on appeal.

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## STATEMENT OF FACTS

Plaintiff William G. Vandever & Company (hereinafter referred to as "Vandever") is an Oklahoma corporation engaged in the loan brokering business. Defendants and respondents (hereinafter referred to as "Defendants") are four dentists engaged in the practice of dentistry in Salt Lake County. The transaction which is the subject of this lawsuit was the defendants' first venture into a commercial real estate transaction (T-34).

In 1978, the defendants purchased a parcel of land in Salt Lake County with the intention of constructing thereon a dental clinic building. The defendants had been unsuccessful in obtaining financing for the construction, and became in touch with a Mr. H. D. Merritt, who was employed by Vandever. The discussions with Merritt eventually led to the execution of a written agreement which was entitled "Authorization to Obtain Financing".[1] Under the agreement, defendants agreed to pay to Vandever a commission based upon 4% of the loan proceeds in the event Vandever was successful in obtaining a loan of $397,000.00, "or for such other amounts and/or terms as may be acceptable to the parties".[2]

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[1] The entire written "Authorization to Obtain Financing" is photocopied at Appendix A at the back of this brief. This document was Exhibit 3-P at the trial. This is the agreement under which Vandever has sued the defendants. It is a form agreement used routinely by Vandever in its brokerage business (T-83).

[2] The quoted phrase is taken from paragraph 2 of the Agreement and is the salient language relied upon by the trial court.



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Thereafter, Vandever notified the defendants that it could not get a loan commitment for $397,000.00 but could get a commitment for $375,000.00. Vandever then delivered to defendants a preliminary commitment from American United Life Insurance Company for $375,000.00 (Exhibit 6-P). The preliminary commitment, except for some very minor items, was unconditional.

Although defendants were disappointed about not obtaining the full financing,[3] they decided to accept the commitment of $375,000.00. They thereupon wrote a letter of acceptance as they were requested to do (Exhibit 7-P), which was accompanied by a good faith deposit to the committing lender in the amount of $3,750.00. The good faith deposit was in addition to another good faith deposit of $3,000.00 which had already been paid to Vandever (T-40).

After American United Life Insurance Company received the good faith deposit, it issued and forwarded to the defendants its final loan commitment. However, when the final commitment was issued, it contained some eight pages of conditions (Exhibit 9-P). Many of the conditions were objectionable to the defendants. Some of the major conditions that the defendants found unacceptable were as follows:

1. The final commitment was not for $375,000.00, but was for

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[3] The original $397,000.00 had been the parties' estimate for 100% financing, less the cost of the land and architect's fee (T-37). From the inception it had been the defendants' goal to obtain 100% financing (T-36).



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the lesser of $375,000.00 or 75% of the appraisal on the building (Exhibit 9-P, page 1). Since there was insufficient time in which to obtain an appraisal, defendants would have been forced to accept a commitment without knowing for sure what the final amount would be (T-41-43).

2. The final commitment had no prepayment option, which was a matter of concern to the defendants (Exhibit 9-P, page 1; T-43).

3. The final commitment provided that the loan could not ever be assigned (Exhibit 9-P, page 6). This was a matter of concern to the defendants as they wanted to be able to sell the property in future years (T-43).

4. The final commitment prohibited any secondary financing (Exhibit 9-P, page 7). This made the package totally unacceptable, since the defendants knew that they weren't getting 100% financing and knew that they would have to get secondary financing, thus making the acceptance of the commitment impossible (T-43).

5. The final commitment did not provide for construction financing and the defendants had understood that construction financing would be included (T-36,44).

6. The final commitment required the defendants to pay all of the closing costs, lender's attorney's fees and other expenses incurred in connection with the building (Exhibit 9-P, page 7). This was of concern to the defendants as they had no idea as to what these expenses would be (T-44).

7. The final commitment was subject to approval and acceptance of the building after construction (Exhibit 9-P, page 5).


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Defendants were concerned about the lender arbitrarily not accepting the building after it was built (T-44).

8. The final commitment required the purchase of insurance in an undefined amount (Exhibit 9-P, page 4). This was of concern to the defendants (T-44).

9. An item of major importance was the fact that the commitment was conditional upon the entire building being leased at a rental rate of $9.75 per square foot (Exhibit 9-P, page 3). This was above the current rental value of $8.00 to $8.50 per square foot. Defendants did not believe that they could rent the space for more than its fair market value and didn't want to even try to ask tenants to pay an inflated rent (T-45).

Prior to receiving the final commitment letter, the defendants had never been told of the above conditions (T-38,39). They felt that many of the conditions were unfair (T-62). They nevertheless gave very serious consideration to acceptance of the final commitment,[4] but eventually concluded among themselves that they simply could not accept it. They thereupon notifed Merritt that they were declining the final loan commitment of American United Life Insurance Company (T-48). Merritt told them that if they didn't go ahead with the loan, a lawsuit would be filed by Vandever to collect the commission.(T-49). This lawsuit then followed.

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[4] The defendants even met together and signed the agreement, but it was never delivered to anyone (T-47).



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The initial agreement between Vandever and the defendants had required defendants to pay a good faith deposit of $3,000.00, of which $2,000.00 was to be returned if Vandever was unsuccessful in securing acceptable financing.[5] This was the basis of defendants' counterclaim upon which they were awarded judgment for the $2,000.00.

## ARGUMENT

### POINT I

### APPELLANT VANDEVER IS NOT ENTITLED TO RECOVER ANY COMMISSION

The following paragraphs taken from the agreement between the parties (See Appendix A) set forth the conditions under which Vandever would be entitled to a commission:

> "2. This authorization is for financing in the amount of $397,000.00, Three Hundred Ninety Seven Thousand Dollars, for a period of (30) thirty years, with interest at a rate of not greater than (to be negotiated) % per annum, <u>or for such other amounts and/or terms as may be acceptable to the parties</u>.
>
> . . .
>
> 7. In consideration of WGV services in negotiating such financing, the undersigned agree to pay WGV or his assigns 4% of the total amount of the financing or loan commitment at the time the commitment is issued to the undersigned, their principals or agents. WGV's fee will be considered earned upon the issuance of financing or a loan commitment by the lending institution(s) and/or investor(s) <u>in accordance with the terms of paragraph two (2) above</u>, and payment of WGV's fee will be due upon issuance of same." (Emphasis added)

After hearing the evidence, the trial court found that the loan commitment contained numerous conditions that were objectionable; that no loan was ever obtained or offered on terms that were

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[5] See paragraph 9 of the Agreement at Appendix A.



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acceptable to the defendants; and that the plaintiff was not entitled to recover any commission (R-87). These findings are entitled to the usual presumptions on appeal. The findings and judgment are endowed with a presumption of validity; the party attacking the judgment has the burden of showing that it is in error; and the evidence and all inferences that fairly and reasonably may be drawn therefrom must be viewed in the light most favorable to the prevailing party. Cheney v. Rucker, 14 Utah 2d, 205, 381 P.2d 86. The Supreme Court should not substitute its judgment for that of the trial court on issues of fact when the findings are based upon substantial, competent and admissible evidence as was the case here. Fisher v. Taylor (Utah 1977), 572 P.2d 393. Also, the refusal of the trial court to modify the judgment upon motion for new trial (R-95-110) gives it a further degree of sanctity which increases the hesitancy in disturbing it upon review. Schneider v. Suhrmann, 8 Utah 2d 35, 327 P.2d 822.

Defendants have no quarrel with the decisions cited in appellant's brief to the effect that a real estate broker earns his commission when he produces a buyer who is ready, willing and able to purchase the listed property for the full amount of the listing price. If such a buyer is found, seller is liable for the commission regardless of whether he actually goes through with the sale. However, in comparing real estate cases, it is misleading to use cases involving offers for the full purchase price. A much more analogous situation is where the broker obtains an offer that is less, or otherwise varies from the listing price. Under these


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circumstances, the general rule of law may be found at 12 Am.Jur. 2d Brokers, §185, which provides as follows:

> "Where a broker, instead of procuring a person who is ready, able, and willing to accept the terms his princi-authorized him to offer at the time of his employment, procures one who makes a counter offer more or less at variance with that of his employer, the latter is at liberty either to accept the proposed party upon the altered terms or to decline to do so, without giving the broker his reasons for the refusal. If he accepts, he is legally obligated to compensate the broker for the services rendered, but if he refuses he incurs no liability therefor."

The above principle has been applied in the Utah case of Hansen v. Snell, 11 Utah 2d 644, 354 P.2d 1070. In Hansen, the broker delivered an offer where everything was in compliance with the listing except the rate of interest to be paid on an installment contract. The seller insisted upon 10% interest and the sale failed because the buyer was unwilling to pay that rate. The broker then sued for his commission claiming that the seller was demanding an unreasonable rate. The listing contract was silent as to any interest rate, and the trial court held with the broker finding that the seller's demand was unreasonable and that the statutory interest rate of 6% should apply. On appeal, the Supreme Court reversed the decision pointing out that the agreement of the parties had language to the effect that the sale was to be made on "terms to suit the seller" and that the interest rate was clearly a "term". Since the broker had not satisfied the seller as to this term, he had not met the conditions that would entitle him to a commission and there would be no obligation to pay the broker a commission under those circumstances. It may be noted



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that the language "terms to suit the seller" as used in Hansen is substantially the same as "terms acceptable to the parties" as used in the instant case.

Other typical recent cases supporting the position of the defendants are Boyer Company v. Lignell (Utah 1977), 567 P.2d 1112; Strout Western Realty Agency, Inc. v. Peterson (Utah 1978), 585 P.2d 456; and Allphin Realty, Inc. v. Sine (Utah 1979), 595 P.2d 860.

In Boyer Company v. Lignell, supra, the broker could not recover a commission where the offer differed from the listing agreement and the sale did not go through. The court made the following comments in its decision:

> "The law is well settled that the broker is not entitled to a real estate commission until he has a written binding offer or agreement signed by a ready, willing and able purchaser. This means that all of the terms and conditions must be agreed upon between the parties. Since all of the terms were not agreed upon between the parties, no commission was earned."

In Strout Western Realty Agency, Inc. v. Peterson, supra, a commission was not allowed where the terms of the offer differed from the listing agreement, even though the seller offered cash. And in Allphin Realty, Inc. v. Sine, supra, no commission was allowed where the listing agreement did not require the seller to accept any offer. See also Engineering Associates, Inc. v. Irving Place Associates, Inc. (Utah 1980), 622 P.2d 784, holding that no contract existed between a mortgage broker and its customer where there was never any mutual assent to all of the essential terms.

It is clear from all of the above authorities that the trial court correctly applied the law.



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## POINT II

### APPELLANT'S CLAIMS OF LACK OF COOPERATION, FAILURE TO APPLY OBJECTIVE OR INDUSTRY STANDARD, AND REPUDIATION OF CONTRACT ARE WITHOUT MERIT

Under Point III, IV, V and VI of appellant's brief, arguments are made with respect to claims of lack of cooperation, failure to apply objective or industry standards, and repudiation of contract. These points are completely without merit and may be dealt with in a summary manner.

Lack of Cooperation. Appellant has cited no factual conduct in its brief that would show any lack of cooperation on the part of defendants. No evidence was presented of any such conduct. The only basis for this claim is the defendant's refusal to accept the final loan commitment. The cases are very clear that the refusal of a seller to accept terms that are objectionable to him does not constitute lack of cooperation. Boyer Company v. Lignell, supra; Strout Western Realty Agency, Inc. v. Peterson, supra.

Objective Standard. The contract between the parties establishes as a condition to recovery the procuring of a loan commitment on "terms as may be acceptable to the parties". This language clearly establishes a subjective standard. Further, the contract form was a standard printed agreement used by Vandever routinely in its business (T-83), so if there is any ambiguity in the language as to the correct standard, the ambiguity must be construed strictly against the party that drafted the agreement and favorably to the other party against whom it is invoked. Wells Fargo Bank v. Midwest Realty & Finance Company (Utah 1975), 544 P.2d 882; Wagstaff v.



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Remco, Inc. (Utah 1975), 540 P.2d 931. The case of Hansen v. Snell, supra, would also clearly require the application of a subjective standard.

However, regardless of the above, the reasons given by the defendants for declining the loan commitment were not petty or whimsical, but were very substantial. The loan was declined not for one, but for many reasons. If a reasonable man standard is applied, the same result would necessarily follow.

Industry Standard. Appellant claimed in its brief that the final commitment letter of American United Life Insurance Company was a "standard" real estate loan commitment. Respondents do not seriously believe that there is any such thing as a "standard" real estate loan. However, in any event, no evidence was offered at trial as to any industry standard. Vandever submitted a pre-trial witness list (R-57) wherein it listed William H. Starkweather as an expert witness to testify as to the terms of the financing commitment. Mr. Starkweather was never called as a witness. Certainly, the factfinder can view with mistrust any allegation that is unsupported by available evidence, if any such evidence exists (see J.I.F.U. §3.13). Further, there was no evidence whatsoever that any of the defendants would have had knowledge of any industry standard, and in fact the affirmative evidence showed that they were novices in commercial real estate transactions.

Repudiation of Contract. The contract between the parties provides by its very terms that after sixty (60) days it may be cancelled by the defendants upon the giving of ten days notice in


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writing (see Appendix A). After the defendants declined to accept the loan commitment of American United Life Insurance Company, and after Vandever made threats of suit against them, the defendants elected through their counsel, Carl N. Erickson, to cancel the agreement (See Exhibit 12-P). The cancellation took place long after the initial 60-day period. Under these circumstances, it is a mystery to the defendants how they could repudiate the contract by doing something that was specifically authorized by the written agreement.

## POINT III

### THE TRIAL COURT CORRECTLY AWARDED JUDGMENT ON DEFENDANTS' COUNTERCLAIM

At the inception of the transaction, defendants made a good faith deposit with Vandever in the amount of $3,000.00. Paragraph 9 of the agreement between the parties (Appendix A) provides that $2,000.00 of this amount shall be returned if financing is not secured. Inasmuch as no acceptable loan commitment was ever secured by Vandever for the defendants, they were entitled to the return of their good faith deposit and the trial court correctly granted to defendants a judgment on their counterclaim for the $2,000.00. Engineering Associates, Inc. v. Irving Place Associates, Inc. (Utah 1980) 622 P.2d 784.

## CONCLUSION

Based upon all of the arguments and authorities as cited herein, respondents and defendants respectfully request that the


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judgment of the trial court be affirmed.

Respectfully submitted,

ARMSTRONG, RAWLINGS, WEST & BROWN

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Attorney for Defendants-Respondents



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PLAINTIFF'S EXHIBIT
NO. 3-P

WILLIAM G. VANDEVER & COMPANY
2114 FOURTH NATIONAL BANK BUILDING
TULSA, OKLAHOMA 74119

918 582-4119
Telex 49-7494

AUTHORIZATION TO OBTAIN FINANCING

1. The undersigned, being duly authorized, do hereby exclusively employ, grant, commission and authorize William G. Vandever & Company, hereinafter referred to as WGV, for the time period stated in paragraph four (4) of this Authorization and Agreement, to make application (s) on our/~~my~~ behalf for financing to one or more lending institutions or investors of WGV's selection for the purposes of Building, A Doctors office complex in SLC UT

It is further agreed by and between the parties that any application(s) for financing to lending institutions or investors during the time period of this Agreement shall be submitted solely and exclusively by WGV.

2. This Authorization is for financing in the amount of $ 397,000.00 Three Hundred Ninety Seven Thousand Dollars, for a period of (30) THIRTY, years, with interest at a rate of not greater than TO BE NEGIOTATED % per annum, or for such other amounts and/or terms as may be acceptable to the parties.

3. The undersigned agree to make available to WGV all documents or documentation necessary to satisfy the requirements of the lending institution (s) or investor (s) without cost to WGV to whom application is made on behalf of the undersigned.

4. This Authorization is effective from the date set forth below and continues for an initial period of 60 days from the date on which WGV has been furnished with all necessary plans, specifications, leases, contracts, cost breakdowns, financial statements, appraisals, and all other data reasonably required by the lender, and thereafter until cancelled in writing by the undersigned.

5. It is further agreed by and between the parties that this Agreement may be cancelled by either party following the expiration of the initial period stated in paragraph four (4) above upon the other furnishing written notice by registered mail, return receipt requested, such cancellation to be effective ten (10) days from date of mailing, however, in such event it is mutually covenanted and agreed that paragraphs six (6) and seven (7) of this Agreement are not cancellable and will be given full force and effect in the event the undersigned should elect to cancel this Agreement.

6. The undersigned agree that the lending institution (s) or investor (s) they are placed in contact with or providing the financing or the loan for the purposes hereinbefore stated may be interested in financing not only subject proposal above but of various other projects now or in the future. Recognizing that contact with the lending institution (s) or investor (s) and the undersigned will be arranged by WGV, his agents, assigns, or successors, the undersigned agrees to pay WGV the same percentage fee as provided in paragraph seven (7) below of any financing, loans or commitments thereof resulting from or made by WGV contacts or efforts, which, within sixty (60) months of this date might be committed, made available, or paid to the undersigned, their principals, agents, assigns, successors, or to any person, persons or entity affiliated with, associated with, owned by or owning, controlled by or controlling the undersigned, their principals, agents, or assigns.

APPENDIX "A"



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7. In consideration of WGV services in negotiating such financing, the undersigned agree to pay WGV or his assigns 4 % of the total amount of the financing or loan commitment at the time the commitment is issued to the undersigned, their principals or agents. WGV's fee will be considered earned upon the issuance of financing or a loan commitment by the lending institution (s) and/or investor (s) in accordance with the terms of paragraph two (2) above, and payment of WGV's fee will be due upon issuance of same.

8. The undersigned agrees that upon financing being obtained, the financing or loan will be guaranteed by: BLACK BLACK BLACK. AND KILLPACK.

9. A Good Faith Deposit of $ 3000.00 is herewith attached which is to be applicable to the financing or loan fee. If WGV accepts this application, but does not secure financing WGV is instructed to refund to the applicants $ 2000.00 retaining $ 1000.00, to cover WGV's cost in processing this application.

10. The undersigned acknowledge that in exclusively employing, commissioning, and authorizing WGV to obtain financing, loans, or commitments thereof, that this Agreement and Authorization was negotiated and accepted in and shall be governed by the laws of the State of Oklahoma.

11. The undersigned agree that this Authorization is assignable by WGV and may be changed only by written agreement and that this Authorization and Agreement shall not be binding or valid until same is accepted by WGV in its offices at Tulsa, Oklahoma.

60 DAYS TO BEGIN NOV. 2, 1978

Corp. ____________ [signature] DDS Date 11/1/78
Individually

By ____________ [signature] Date 11/1/78
Individually

Title ____________ [signature] Date 11-1-78
Individually

Date ____________ [signature] Date 11-1-78
Individually

[signature], atty-in-fact.

PLACE CORPORATE SEAL HERE

ACCEPTED this 6 day of November, 1978

at Tulsa, Oklahoma, by [signature]
William G. Vandever & Company

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