

2007

W.R. Young, Ernest H. Bardsley v. Ray H. Buchanan : Brief of Respondent

Utah Supreme Court

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N. J. Bates; Attorney for Appellant.

Dilworth Woolley; Attorney for Respondent.

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UTAH SUPREME COURT

BRIEF

ET NO. 7844R

In the Supreme Court of the

State of Utah

W. R. YOUNG,
Plaintiff and Respondent,
ERNEST H. BARDSLEY,
Impleaded Plaintiff,

vs.

RAY H. BUCHANAN,
Defendant and Appellant.

NO 7844

RESPONDENT'S BRIEF

DILWORTH WOOLLEY,
Manti, Utah
Attorney for Respondent

N. J. BATES,
Richfield, Utah
Attorney for Appellant

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In the Supreme Court of the State of Utah

W. R. YOUNG,
Plaintiff and Respondent,
ERNEST H. BARDSLEY,
Impleaded Plaintiff,
vs.

NO. 7844

RAY H. BUCHANAN,
Defendant and Appellant.

RESPONDENT'S BRIEF

This is an appeal by the defendant from an adverse judgment for \$500 commission, \$200 attorney's fee and costs, in an action brought by and on behalf of a licensed real estate salesman on a written contract of employment.

The licensed and bonded real estate broker by or for whom the salesman was employed, or under whose authority the salesman worked, was impleaded as a party plaintiff to the action and the judgment runs in his favor for the use and benefit of the salesman, who, under the facts in the case, by reason of the terms of his employment by the broker, is the real party in interest.

The controlling facts in the case are not in conflict and are set out in appellant's brief. We have no quarrel with the appellant's statement of the facts.

ARGUMENT

I.

THIS IS A CLEAR CASE WHERE THE SALESMAN HONESTLY EARNED THE PROMISED COMMISSION; THE ONLY QUESTION TO BE DECIDED IS WHETHER UNDER THE LAW HE IS ENTITLED TO RECOVER IN THIS ACTION.

That the salesman honestly earned the promised commission is demonstrated by the facts.

Buchanan hired Young to find a buyer for the Buchanan home, the price to be \$17,500, later reduced to \$16,500, and promised in writing to pay a commission of \$500 if the salesman were successful in his efforts.

The contract (Ex. A) of hiring, being in writing, was in compliance with the Statute of Frauds, Sec. 33-5-4 (5), U. C. A. 1943.

The contract gives the salesman an exclusive agency to sell for a period of six months from the date of its execution, which was June 12, 1949, and then goes on to stipulate that if Buchanan should sell the property within a period of three months from the date of its expiration to any person to whom Young had previously offered it, then Buchanan would pay the stated commission.

Immediately after the contract was signed Young got busy interesting buyers. He offered the property to several prospects, among the very first being Cecil King. King

was interested but said the price was too high (T. 13, 14, 15, 19).

Young promptly informed Buchanan of King's interest and of his statement regarding the price.

Young continued to work on the sale of the property until the contract expired on December 12, 1949. And then, in January, 1950, which was after the contract had expired as an exclusive listing, Buchanan told Young to continue his efforts to find a buyer at \$17,500; so Young did take other prospects down to look at the place, among them one Wegener, who was very much interested. About March 1 to 4, Buchanan told Young to tell Wegener that the price was reduced to \$16,500 (T. 21).

Young thereupon communicated to King the information that the price had been reduced to \$16,500, and King said he would look at it (T. 22).

Then Young took Wegener down to look at the property, and King and his wife were there talking with the Buchanans (T. 27).

It is not unreasonable to suggest that King made up his mind to buy when he saw that someone else was interested; for Buchanan sold the home to King, the parties dealing directly with each other and by-passing the salesman, for a cash price of \$16,500, on the 17th day of February, 1950, which is the date on the check given at the time of the sale.

It is therefore apparent that Young brought this seller and buyer together, that it was through his efforts that Buchanan was able to sell his home at a price which was satisfactory to him.

Young fully performed the services for which he was employed; Buchanan has reaped the benefits of Young's

services and has enjoyed the fruits of his contract. The sale was made within the stipulated time.

In equity and good conscience, therefore, Young is entitled to his pay.

The judgment in the case does equity and justice between the parties, and for that reason it should be affirmed, unless there be some impelling reason to be found in the statutes relating to real estate brokers and real estate salesmen why it cannot be permitted to stand (Ch. 2, Title 82, U. C. A., 1943).

II.

THERE IS NO LEGAL REASON WHY THIS JUDGMENT CANNOT STAND.

Bardsley was a licensed and bonded real estate broker and Young was a licensed real estate salesman under the laws of the State of Utah during 1949. They had an agreement among themselves to the effect that Young was to pay all expenses of the broker business and was to be entitled to all the commissions on sales which he made. Bardsley himself did not wish to engage in the broker business that year, but he did want to keep his license in effect. It was necessary because of the provisions of the statutes that Young work for or under the direction of some licensed and bonded broker. There does not seem to be any reason whatever why they might not in these circumstances make the arrangement which they did make for payment of the expenses of the business and for the disposition of the commissions. Bardsley had a right to give Young all the commissions just as much as he had the right to pay Young a salary or a part of the commissions. What they did in this respect concerned no one but themselves. So far as the

public is concerned, and so far as the rights of any customer are concerned, these arrangements are wholly immaterial; for the public and the customers are protected by Bardsley's bond, regardless of how the broker and the salesman agreed to dispose of the earned commissions.

The agreement between Bardsley and Young is a material fact, however, upon one question in the case. That question relates to the proper or necessary party or parties plaintiff.

Since the agreement provides that Young is to have all the commissions, it would seem that Young is the real party in interest and is the proper party to bring the action. At the time the action was commenced Section 82-2-18, which prohibits actions by licensed salesmen to collect commissions, was not on the books. It came into the picture in 1951. So there was no statute which in express language prohibited the salesman from maintaining the action. But that statute was in effect when the case came on for trial. When the action was commenced the statutes did prohibit the salesman from accepting his commission directly from the customer. But it did seem to us that such prohibition did not apply to a case like this, where the customer refused to pay any commission at all and where he by-passed the salesman and dealt directly with the purchaser and there was no money to go to the broker except the commission. We therefore commenced the action in the name of Young alone, on the theory that he was the real and only party in interest because of the nature of his contract with Bardsley, the broker.

During the course of the trial, however, this writer became doubtful of the soundness of that position because the legislature by the amendment of the law in 1951 had

emphatically declared that salesmen should not have the right to sue. It did seem that such had been the legislative intent all along, and the amendment had been made to make definite and certain an intention which before had been only implicit in the statutes. So we asked and received permission of the Court to implead Bardsley as a party plaintiff.

It is necessary that he be a party, and, if a recovery is had, it is necessary that payment be made to him, because it would render Young liable to punishment as for a misdemeanor if he were to accept payment of the commission direct from Buchanan. But Bardsley's interest is nil because of his agreement with Young respecting the right to the commissions.

The contract between Buchanan and Young is not illegal. Buchanan had a right to hire Young to sell the home. Young had a right to try to sell it and to accept the employment for he was licensed as a real estate salesman. What else is the license for but to authorize him to engage in the business of selling real estate? Buchanan had a right to promise to pay a commission for the services to be rendered. Young had a right to receive a commission for selling it. The only requirement of the statutes in this regard is that Young must not accept his commission from the hands of the customer, but only through the licensed and bonded real estate broker.

All parties concerned must be presumed to know the law. Certainly Bardsley and Young knew of this statutory requirement, for they both had obtained licenses under the provisions of Chapter 2, Title 82, U. C. A., 1943. So when the contract was made between Buchanan and Young, the latter knew he could not lawfully accept the commission

from the former; and Buchanan presumably knew it would be a criminal act for Young to accept the commission from him, but that it would have to be paid through the bonded broker for whom Young was employed as a salesman.

It was not contrary to law for Buchanan to promise to pay Young a commission. The statute does not prohibit such a promise. It was not contrary to law for Young to accept a commission. It would not be illegal for Buchanan to pay the commission direct to Young, by which we mean to say it would be no crime on Buchanan's part for him to pay direct. The only criminal act involved arises when Young accepts the commission direct from the hands of Buchanan, and it is to avoid that result that it must be presumed that the parties to this contract intended the commission to go through the hands of Bardsley to Young. It will not be presumed that the parties intended any one to become involved in criminal liability. A way was open to them to avoid such a result. That way was through the agency of the bonded broker. So it must be presumed that what they really meant to say, when the contract was written, is that Buchanan would pay Young the commission, but that he would pay it through the agency of Bardsley, who was licensed and bonded to accept it from Buchanan and who was under contract to pay it over to Young.

Buchanan may not have known that Young was working under Bardsley's license and bond, but he is presumed to know that he was working under some licensed and bonded broker. So far as he was concerned, it matters not whether it was Bardsley or someone else; he wanted Young to sell the home and hired him to do so, knowing that he was protected as to Young's integrity by the bond of some broker; and knowing, furthermore, that if Young found

a buyer and a contract were to be closed, the closing agreement would have to be made by a broker and the money, if not paid direct to the seller, would have to go through the trust funds of the broker.

The contract does not require Buchanan to do any act which is prohibited by law; it does not require Young to do any act which is prohibited by law. It is therefore not illegal.

The judgment does not require the doing of any act which is illegal on the part of anyone. The judgment requires that Buchanan pay the commission and the attorney's fee to Bardsley, who by law is entitled to receive it; and who, by reason of his arrangement with Young, is obligated to turn it over to the latter when received. Young is not prohibited by law from accepting the commission from Bardsley; in fact, that is the only place that he may look for it.

If it had not been for the special contract or arrangement under which Young, the salesman, was operating for Bardsley, the licensed and bonded broker, this contract between Buchanan and Young would probably be regarded as a contract between Buchanan and Bardsley; and in that case Bardsley would be the real and only party in interest. But because of the understanding between the broker and the salesman with regard to the expenses of the office and the commissions to be earned, the contract is in reality as well as in form between Buchanan and Young, the broker as a matter of fact appearing in the picture only as the intermediary through whom the commission may lawfully be paid.

The thought is expressed in appellant's brief that this judgment is wrong because the contract had expired on

February 17, 1950, when the property was sold; and that Bardsley's license had not been renewed for the year 1950, hence Young's license was not in force.

It is true that the contract had expired when the property was sold. But the liability of Buchanan to pay the commission on any sale which he made within three months after the date of expiration had not expired. It continued for a full period of three months from December 12, 1949. The cause of action did not arise until February 17, 1950.

It is true that Bardsley did not renew his broker's license for 1950, but Young did renew his salesman's license for that year, working for another licensed and bonded broker.

We have no quarrel with the statutory regulations of real estate brokers and real estate salesmen. Our only concern is to bring our actions in line with them, to learn and know what they require and to act accordingly. We are not prepared to believe that the legislature intended, when it adopted the regulatory statutes with which we are here concerned, to provide for a system of operations under which a salesman in Young's situation would be denied all remedy against the defendant. But such would be the result should the Court reverse this judgment.

We respectfully submit that there is nothing morally or legally wrong with any act on the part of Bardsley or Young in respect to this transaction; that the statutes should be and can reasonably be construed and applied in such a manner as to require that this judgment be affirmed.

We therefore respectfully submit that the judgment should be affirmed and that respondent be awarded his costs.

DILWORTH WOOLLEY,
Attorney for Respondent,
Address: Manti, Utah.