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Bonneville Properties, Inc. v. Dan Simons : Brief of Plaintiff-Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

BONNEVILLE PROPERTIES, :
INCORPORATED, a Corporation, :
 :
Plaintiff-Respondent, :
 :
vs. : No. 18223
 :
DAN SIMONS, :
 :
Defendant-Appellant. :

BRIEF OF PLAINTIFF-RESPONDENT
BONNEVILLE PROPERTIES, INCORPORATED

Appeal from the Judgment of the
Third Judicial District Court, Salt Lake County
Honorable Homer F. Wilkinson

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Plaintiff-Respondent, :
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vs. : No. 18223
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DAN SIMONS, :
 :
Defendant-Appellant. :

BRIEF OF PLAINTIFF-RESPONDENT

STATEMENT OF THE CASE

Defendant-Appellant Dan Simons obtained a listing to sell real property known by the parties as the Fashion Fabrics Warehouse, which listing was advertised through the Multiple Listing Service of the Salt Lake Board of Realtors. Bonneville Properties, Inc., Plaintiff-Respondent, relying upon such listing and Simons' published commission split of sixty percent (60%) to the selling office and forty percent (40%) to the listing office, introduced the ultimate buyer of the warehouse to Simons. Subsequent to the introduction of such buyer by Bonneville to Simons, Simons reversed his commission split without knowledge of or agreement of Bonneville. When sale of the warehouse was consummated, Bonneville received forty percent (40%) of the commission then payable between the parties with sixty percent (60%) being paid to Simons. Bonneville thereafter brought this action against Simons for breach of contract and unjust

enrichment alleging damages for the additional twenty percent (20%) of commissions.

DISPOSITION IN LOWER COURT

After trial before the Honorable Homer F. Wilkinson, judgment was granted in favor of Bonneville in the sum of \$11,000.00 together with prejudgment interests and costs for a total award of \$14,925.83. The Court concluded that Simons made an offer for a contract and pursuant to such offer, Bonneville introduced to Simons the ultimate purchaser of the Fashion Fabric Warehouse. Notwithstanding the consummation of the sale and purchase at a date subsequent to a unilateral change of commission splits by Simons, the activities of Bonneville were significant to the sale entitling Bonneville to commissions based upon the original terms of sixty percent (60%) to the selling office.

RELIEF SOUGHT ON APPEAL

Simons seeks a reversal of the district court's judgment in favor of Bonneville. Bonneville resists and opposes the relief sought by Defendant and Appellant.

STATEMENT OF FACTS

On the 25th day of September, 1974, the Defendant Dan Simons doing business as Real Estate Consultants obtained an exclusive listing of property known as the Fashion Fabrics Warehouse. Such listing was advertised through the Salt Lake Board of Realtors Multiple Listing Service. At the date of publication of the Fashion Fabrics listing, Simons'

published commission split to members of the Multiple Listing Service was sixty percent (60%) to the selling office and forty percent (40%) to the listing office. Some time during the month of December, 1974, L. Richard Sorensen and Dennis Christensen, employees and agents of Bonneville Properties, Inc., each saw the Fashion Fabrics listing in the Multiple Listing Service and also became aware of the commission split as advertised and offered by the Defendant Simons. During the applicable periods of 1974 and 1975 Plaintiff Bonneville Properties, Inc. was authorized to act within the State of Utah as a corporate broker in that L. Richard Sorensen was licensed as a real estate broker for and on behalf of the Plaintiff.

Subsequent to the discovery of such listing, Bonneville was advised by Simons that Fashion Fabrics would be willing to accept an offer for purchase of the subject property at a price of \$3,800,000.00, with a cash down payment of \$850,000.00 and the balance of \$2,950,000.00 payable in accordance with the terms of a real estate contract. Such terms would also include a lease back of the property by Fashion Fabrics. After being advised of the acceptable terms of an offer, the Plaintiff, by and through its agents L. Richard Sorensen and Dennis Christensen, met with Simons in December, 1974, at the offices of Gary Jenkins and at this meeting it was disclosed to Simons that A.K. Utah Properties was a prospective purchaser of the

Fashion Fabrics Warehouse. Simons admits in his pleadings that Bonneville introduced to him the party who purchased the Fashion Fabrics Warehouse.

On the 2nd day of January, 1975, effective January 10, 1975, Simons unilaterally revised his commission split arrangement by advising the Salt Lake Board of Realtors by letter that all commissions would thereafter be paid forty percent (40%) to the selling office and sixty percent (60%) to the listing office. On the effective date of such change, no written agreements had been reached between A.K. Utah Properties and Fashion Fabrics or A.K. Utah Properties and Robert Swanner Company regarding the sale of the subject property and an exchange which was to take place thereafter.

Although Plaintiff's agent, Dennis Christensen, subsequent to the meeting in December, 1974, requested to be in attendance at all negotiations between Fashion Fabrics and A.K. Utah, Simons advised Mr. Christensen that he did not want him in attendance at such meetings. Nevertheless, as early as January 16, 1975, attorneys for A.K. Utah advised Fashion Fabrics and Defendant Dan Simons that they expressed an intent to purchase the Fashion Fabrics Warehouse subject to certain conditions and the preparation and execution of final documents. The intent as expressed a letter of January 16, 1975, providing essentially that the purchase was to be \$3,800,000.00 with a down payment of \$850,000.00. The balance of the purchase price,

\$2,950,000.00 was payable in accordance with a terms of a real estate contract. Additional terms were set forth in the letter but included the lease back of the Fashion Fabrics Warehouse by Fashion Fabrics.

Notwithstanding Mr. Simons' instructions to Mr. Christensen, Mr. Christensen and Mr. Sorensen were ready and willing at all times to offer assistance to the Defendant Simons with respect to the sale.

In February, 1975, A.K. Utah Properties and Fashion Fabrics entered into contracts dated February 3, 1975, for the purchase and sale of the Fashion Fabric Warehouse. The contracts provided that A.K. Utah Properties would purchase the subject property at \$3,800,000.00 with a down payment of \$900,000.00 and the balance of \$2,900,000.00 to be paid in accordance with the terms of a uniform land sales contract. Such contract further provided that Fashion Fabrics would lease back the subject property from the purchaser. A closing of the transaction and a conveyance of the property occurred on March 27, 1975. Immediately thereafter A.K. Utah exchanged the property with property owned by the Robert Swaner Company.

As a result of the sale of the Fashion Fabrics Warehouse, commissions totalling \$125,000.00 became due and payable to the participating brokers, \$100,000.00 of which is in dispute in the present action. Plaintiff was paid the sum of \$40,000.00 representing forty percent (40%) of the

commissions, all of which were paid in accordance with the commission split arrangement which was effective as of the 10th day of January, 1975. The Defendant Simons was paid commissions totalling \$60,000.00 (\$38,000.00 in cash and \$22,000.00 represented by 17,600 restricted shares of Fashion Fabric stock). Bonneville Properties received its last commission payment on the 1st day of May, 1976.

On or about June 3, 1976, Plaintiff's agent Dennis Christensen filed suit on his own behalf against the Defendant Simons in the United States District Court for the District of Utah seeking damages for alleged violations of anti-trust laws of the United States alleging a conspiracy to deprive Christensen from his fair share of the real estate commission attributable to the sale of the Fashion Fabrics Warehouse and for a breach of contract. Plaintiff was not a party to the Federal action. On the 3rd day of December, 1976, and in settlement of such action, Dennis Christensen executed a general release of all of his claims in favor of the Defendant Simons with respect to any claims or causes of action attributable to the transaction involving the sale of Fashion Fabrics Warehouse.

The commission arrangement and agreement which existed between the Plaintiff and its agent Dennis Christensen provided that Plaintiff was to receive ten percent (10%) of all commissions to defray costs with the remaining amount of

commissions to be split equally between the agent and the Plaintiff.

ARGUMENT

I

A. Plaintiff Bonneville has earned its commission by substantial performance.

Restatement of Contracts, Section 45, sets forth the generally accepted principle that where substantial performance has been completed by an offeree, a unilateral contract becomes irrevocable for a specified or reasonable amount of time. Section 45 states:

If an offer for a unilateral contract is made, and part of the consideration requested in the offer is given or tendered by the offeree in response thereto, the offeror is bound by a contract, the duty of immediate performance of which is conditional on the full consideration being given or tendered within the time stated in the offer, or, if no time is stated therein, within a reasonable time.

Comment B provides further explanation.

. . . The main offer includes as a subsidiary promise, necessarily implied, that if part of the requested performance is given, the offeror will not revoke his offer, and that if tender is made it will be accepted. Part performance or tender may thus furnish consideration for the subsidiary. Moreover, merely acting in justifiable reliance on an offer may in some cases serve as sufficient reason for making a promise binding. (See Section 90.)

The principles enumerated in the Restatement of Contracts have been adopted by the Utah Supreme Court in the matter of Auerbach's, Inc. vs. Kimball, 572 P.2d 376 (Utah

1977). There, the Court addressing the ability of an employer to withdraw an offer made to an employee for a pension after completion of years of service concluded that after substantial performance the offer could not be withdrawn. At page 378, the Court concluded:

According to Kimball this offer was extended to him by Auerbach's in the 1950's. Auerbach's contends it revoked the offer on April 26, 1971. Since Kimball had performed a substantial part of the performance required in Auerbach's alleged offer, the offeror could not withdraw the offer, and would be bound by its promise. (Citations omitted.)

In the present controversy, Simons made a similar offer to Bonneville. Simons through the Multiple Listing Service offered that in the event another brokerage company were able to find a purchase of the Fashion Fabrics Warehouse that such brokerage company would be entitled to the payment of sixty percent (60%) of the commissions earned. Upon notice of such offer and after communications with Simons, Bonneville, through its agents, disclosed to Simons a prospective purchaser. Subsequent to such performance on the part of Bonneville, Simons attempted to modify the terms of his prior offer by reducing the commission split payable to the selling office. Simons nevertheless agreed that the disclosure of the prospective buyer was "significant" with respect to this transaction. (TR.184) Therefore, in accordance with the rule set forth in the Restatement of Contracts and as adopted by the Supreme Court of the State

of Utah, the offer of Simons became irrevocable allowing Bonneville to thereafter supply the remaining consideration requested, assuming arguendo that any further efforts were required on the part of the Plaintiff.

B. Bonneville Properties, Incorporated has Substantially Performed its Contract with the Defendant.

There can be no dispute in the controversy before the Court that A.K. Utah Properties ultimately, for whatever reason, purchased the interests of Fashion Fabrics in the Fashion Fabrics Warehouse, and that as a result of such purchase, a commission became due and payable to Defendant, Dan Simons. Notwithstanding the admission of Simons that Bonneville was paid in accordance with the commission split in effect as of January 10, 1975, Simons now contends that Bonneville did not perform its agreements thereby precluding it from any claim to further payments. Simons asserts that Plaintiff is not entitled to additional commission because if failed to produce a written binding offer from a buyer ready, willing and able to purchase in accordance with the terms of the Simons' listing and that such offer did not exist as of the effective date of the assignment. It has been established, however, in the matter of Armstrong vs. J.H. Webber & Co., 158 P. 957 (Wash. 1916) that the law of procuring cause is not applicable with respect to suits between brokers or salesmen and brokers. See also Draft vs. Enos, 318 P.2d 66 (Cal. App. 1957). What is significant and

determinative of the rights of the parties is the contract between the respective brokers. Armstrong, supra. In the instant case, the contract between the Plaintiff and Defendant is found to include the terms set forth in Paragraph 17 of the Multiple Listing Rules and Regulations. (Exhibit 3-P)

When one member sells or exchanges property listed with the service by another member, the gross commission shall be divided on a previously agreed basis.

The previously agreed basis, that published in the Multiple Listing Service, provided that sixty percent (60%) would be paid to the selling office. The issue in the present controversy then is whether or not the Plaintiff sold the property listed with the Defendant, and if not, whether such performance was excused by the conduct of the Defendant.

The facts in the present controversy are most appropriately addressed by the law and facts as set forth in the matter of Bowie vs. Martin, 85 A.2d, 786 (Maryland 1952). In that action, the plaintiff and defendant had agreed that if plaintiff were to sell certain property, plaintiff would be entitled to split a commission on a 50-50 basis. The evidence established that the defendant had on numerous occasions previously contacted the ultimate purchasers and that these contracts occurred over a period of time from 1947 to May of 1950. Notwithstanding these contacts, the plaintiff showed the property in question to

the ultimate purchaser in April of 1950 and thereafter made several attempts to contact the defendant broker regarding a proposal for purchase. After these activities of the plaintiff, the prospective purchasers contacted the defendant broker directly with an offer and the defendant broker wrote the contract. (Emphasis added.) Thereafter, with some minor changes made by an attorney, the purchasers signed the agreement and purchased the property. The appellate court upheld the decision of the trial court which found that the plaintiff was entitled to one-half of the commission on the grounds that the purchasers went to the defendant as a result of the efforts and activities of the plaintiff. The Court further concluded that there was no evidence to justify any assertion by the defendant that the plaintiff was inactive or dilatory or acted in bad faith so as to preclude recovery.

In the case before this Court, it is apparent and admitted by Simons that the activities of Bonneville were a "substantial" factor in consummating the sale between A.K. Utah and Fashion Fabrics. Although negotiations were conducted by others, as was the fact in the matter of Bowie vs. Martin, such negotiations would not have taken place but for the activities of Bonneville. As in the case of Bowie, there is no evidence to indicate that Bonneville was inactive, dilatory or acted in bad faith, but in fact, the evidence demonstrates that Bonneville, through its agents,

attempted to involve itself in negotiations, but was excluded by the request of Simons. Therefore, as in the matter of Bowie vs. Martin, the activities of Bonneville are sufficient to constitute a sale and Bonneville thereby earned its commission. By Simons's own conduct and admissions arising therefrom, such activities were sufficient for Fashion Fabrics and Simons to previously pay Bonneville \$40,000.00 in accordance with the modified commission split arrangement.

The conclusion that Bonneville is entitled to its commission is further substantiated by the facts of Armstrong vs. J.H. Webber & Co., supra. In that case, the plaintiff entered into a contract with a broker to receive 50% of all commissions made through her efforts on sales of a rooming house and hotel. The plaintiff thereafter negotiated an exchange of an apartment and rooming house and was discharged by the defendant broker about the time that the transaction was consummated. Although the defendant broker closed the matter himself, the Court concluded that the evidence was sufficient to uphold the trial court's verdict that the plaintiff was entitled to payment of her commissions. This was not withstanding the fact that the contract ultimately concluded between the parties differed in terms from the one originally talked about, since it was one continuous transaction from its origination to its consummation.

Bonneville in this action is also entitled to an award of the additional commission on the principles set forth in the matter of Boyer vs. Lignell, 567 P.2d 1112 (Utah 1977). Although clearly addressing issues with respect to a brokerage arrangement between an owner and broker, the Court adopted the principle "that a party to a real estate listing agreement cannot prevent or interfere with the performance of the agreement and then assert the non-performance as a defense". Boyer Company, supra, at page 1114. The uncontroverted evidence established at trial in this matter demonstrates that Simons precluded Bonneville from further performing in assisting or otherwise negotiating with the respective parties to complete the sale. Therefore, Simons cannot now be heard to complain of any alleged non-performance on behalf of Bonneville. Furthermore, notwithstanding the fact that Bonneville did not participate in final negotiations does not necessarily preclude Bonneville from recovery. In discussing the issue of procuring cause between a broker and owner, the Utah Supreme Court in the matter of Frederick May & Company, Inc. vs. Dunn, 368 P.2d 266 (Utah 1962) stated at page 269:

Usually, whether the broker first approaches, or brings to the attention of the buyer that the property is for sale, or brings the buyer into the picture, is considerable weight in determining whether the buyer (sic - broker?) is the procuring cause of sale. The fact that the sale was consummated without participation by the broker in the final negotiation does not

preclude him from recovering his commission if the sale was otherwise procured by him.

All the principles enumerated above can best be summarized as stated by the Court in the matter of De Benedictis vs. D. Gerechoff, 339 A.2d 225 (N.J. App. 1975) at page 229:

In co-broker agreements the broker who furnishes the buyer to the seller even though the ultimate sell is for a lesser price, is entitled to share in the commission provided, however, that there has been no significant breach in the negotiations. (Citations omitted.)

In the matter before this Court, the evidence is clear and is admitted by Simons that Bonneville furnished the buyer to the seller. Furthermore, the evidence establishes that there was no break in negotiations between the parties and that in light of the introduction occurring in late December 1974 and a letter of intent being signed on January 16, 1975, the matter went together very quickly after such introduction by Bonneville. The evidence clearly indicates that but for this introduction and notwithstanding the efforts of Simons the sale is directly attributable to Bonneville. Bonneville thus performed its original contract with Simons and as such is entitled to payment of an additional commission all in accordance with the original published commission split.

C. Bonneville is Presumed to be Capable of Completing its Contract with Simons.

Simons implies that Bonneville, by its agent Dennis Christensen, was incapable of completing the sale between Fashion Fabrics and A.K. Utah and that this justified a change in the commission split precluding Bonneville from payment of any additional commission. Simons did not raise this matter as a defense in the pleadings, at trial or at a time when Bonneville was paid \$40,000.00 as selling agent. Plaintiff now asserts that this issue is improperly before the Court.

Notwithstanding Simons' failure to raise this issue, Bonneville asserts that resolution of the issue is in its favor. Simons ignores the facts established at trial as well as the statutory licensing requirements for brokers imposed by the State of Utah. Not only was Dennis Christensen to be involved in the sale and negotiations regarding the sale of the Fashion Fabrics Warehouse to A.K. Utah Properties, but L. Richard Sorensen, the official broker for Bonneville, was to be involved. Mr. Sorensen had met with Defendant Simons to discuss the terms of a proposed offer and later attended the meeting whereby Simons was advised of the potential purchaser. Mr. Sorensen expected to continue with the transaction, and in fact, made several telephone calls to monitor the progress of the transaction. As a licensed real estate broker for Bonneville, Mr.

Sorensen and Bonneville have been authorized by the State of Utah to engage in any activity of a real estate broker, as defined by Section 61-2-2, Utah Code Annotated (1953, as amended), including but not limited to the sale of industrial and commercial property. "With due regard for the paramount interest of the public," Mr. Sorensen was required to demonstrate to the real estate examiners prior to the issuance of his broker's license his honesty, integrity, truthfulness, reputation and his competency. Utah Code Annotated, Section 61-2-6 (1953, as amended). By the mere act of licensing, the State of Utah has concluded that Mr. Sorensen and Bonneville have met certain levels of competency. This Court must, therefore, presume and conclude that where no evidence exists to the contrary Bonneville and Mr. Sorensen were competent. Simons neither raised Bonneville's competency as an issue nor offered any proof that Bonneville and/or L. Richard Sorensen were incapable of performing its contract with Simons. Beyond its statutory right to act as a broker, it is not Bonneville's obligation to prove its competency, but Simons' obligation to prove Bonneville's incompetency. Simons has totally failed to prove this fact.

DENIAL OF DEFENDANT'S MOTION FOR LEAVE TO AMEND HIS ANSWER
SHOULD BE CONFIRMED

As set forth in Defendant-Appellant's Brief, Simons requested leave to amend his Answer five days prior to trial. Simons's Motion was argued before the Court immediately prior to trial on August 31, 1981. As Simons stated in his brief, Bonneville opposed this Motion on the grounds that Bonneville was unprepared to offer any evidence concerning the agency relationship which may have existed between A.K. Utah and Jelco. A particularly important witness, Gary Jenkins, was no longer residing within the State of Utah but in fact resided in Phoenix, Arizona. The representative of A.K. Utah at trial, Mr. Emanuel Floor, did not enter into his employment with A.K. Utah until January 1, 1975, a time subsequent to the introduction. As a consequence, the Court denied Simons' Motion concluding that the prejudice to the Plaintiff outweighed the justice which might be served in allowing amendment to Simons' Answer.

It is a well accepted principle of law that application for leave to amend a pleading is ordinarily addressed to the sound discretion of the trial court and that this discretion will not be disturbed upon appeal except in a case of abuse of such discretion. Benson vs. Oregon Shortline R. Co., 35 U. 241, 99 P. 1072. The Utah Supreme Court has further stated that a more liberal rule would be applied in cases

where amendments are offered before trial than where offered during or after trial. At trial the parties might be taken by surprise or handicapped in the meeting of new allegations. Johnson vs. Brinkerhoff, 89 U. 530, 57 P. 2d 1132.

In the case before the Court, Simons admitted in his pleadings, filed almost six (6) years before trial that Bonneville had introduced Simons to the party who purchased the Fashion Fabrics Warehouse. Simons' motion sought to amend this admission, thereafter denying the same. As a consequence, an issue would immediately have arisen concerning Gary Jenkins and Jelco's authority to act for and on behalf of A.K. Utah. This question of principle-agency relationship was not at issue during the discovery period of this case and was only raised by the motion of Simons immediately prior to trial. Inasmuch as Jelco's past representative was then residing in the State of Arizona and inasmuch as no representative of A.K. Utah was available for the applicable period of time, Bonneville was placed at great prejudice in presenting evidence of this potential issue at the time of trial. Bonneville had in fact relied upon the status of the pleadings for a period of approximately six (6) years. To place such a major question at issue immediately prior to trial was unjustifiable. By the same argument, Simons' motion for leave to file an amendment to conform to the evidence was improper. With

Simons' admission, Bonneville was not obligated to introduce evidence of Jenkin's or Jelco's authority to act for A.K. Utah and the district court's refusal to grant Simons' motion was proper.

III

NO PREJUDICIAL ERRORS OCCURRED AT TRIAL REQUIRING REVERSAL OF THE COURT'S JUDGMENT

A. Plaintiff had authority to prosecute this action.

At trial, the Defendant moved to dismiss Bonneville's action alleging that Bonneville lacked statutory authority to prosecute the same pursuant to the provisions of Section 61-2-18, Utah Code Annotated (1953, as amended). In essence, Simons asserted that Bonneville, as a corporation, was not duly licensed as a real estate broker and therefore could not maintain its action for recovery of the commission. In support of this motion, Simons filed the Affidavit of Mr. Steven Francis, Director of the Real Estate Division of the State of Utah. Thereafter, however, Mr. Francis testified and further explained the procedure for licensing of corporations. In this regard, the Court noted certain inconsistencies between Mr. Francis' Affidavit and his testimony thereafter ruling in favor of Bonneville's right to prosecute this action.

Mr. Steven Francis explained that the Department of Business Regulation did not issue licenses to corporations per se but that they did issue licenses in the name of

corporations provided that simultaneously therewith a broker was designated broker for the corporation. Mr. Francis thereafter testified that this procedure was followed by Bonneville for the years 1974 and 1975 and that nothing further was required of Bonneville for the applicable periods of time. (TR. pages 210 - 216.)

As such, Bonneville was licensed as a broker and had performed all activities required of it by the Department of Business Regulations. Section 61-2-2, Utah Code Annotated (1953, as amended), provides that a real estate broker can be a corporation and where Bonneville has satisfied the State of Utah it must be treated as such. Certainly, this compliance would allow Bonneville to prosecute this action as a real estate broker.

B. Denial of Proof regarding Custom and Usage was Proper.

21 Am Jur 2d, Customs and Usages, Section 31, sets forth:

Where a custom or usage is a special or particular one, where is local in character, the party who proposes to rely upon it is required to aver it in his pleadings; otherwise he cannot, or the objection of this adversary, prove it.

Such a rule has equal application to a defendant.

In the present controversy, Simons made a general denial regarding the existence of a contract between Bonneville and himself. At trial, however, Simons' counsel made an attempt to introduce evidence regarding custom and

usage among real estate brokers in the area of commercial and industrial real estate. Bonneville objected to the introduction of such evidence based upon Simons' failure to plead the same. Bonneville asserts that the very reason for requiring custom and usage to be specifically plead is to give the opposing party an opportunity to talk with witnesses, to determine the existence of custom and usage, and if the same exists to obtain witnesses to testify concerning the same. Where a custom is not of such notariety among the world that the Court and the public can take notice of it, notice pleading requires that the custom be specifically pleaded. Because the custom Simons wished to rely upon was not of such general knowledge, introduction of evidence regarding the same amounted to surprise to Bonneville, which surprise would have resulted in prejudice to Bonneville. Because Simons did not specifically plead this defense, the Court's ruling was appropriate and no evidence exists to show that the Court's discretion was abused.

C. Plaintiff is Entitled to Prejudgment Interest.

Section 15-1-1, Utah Code Annotated (1953, as amended) provided during the applicable dates of this suit that :

The legal rate of interest for the loan or forbearance of any money, goods or things in action shall be six percent (6%) per annum.

This Court has previously held in actions for breach of contract or for actions upon debts overdue, that interest at

six percent (6%) per annum is allowable. See Salt Wet Wash Laundry vs. Colorado Animal By-products Co., 104 U. 385, 140 P.2d 344. Wasatch Min. Co. vs. Crescent Min. Co., 7 U. 8, 24 P. 586, Affirm 151 U.S. 317, 338 Lawyer Ed. L.Ed. 177, 14 S. Ct. 348. As a consequence, the Court concluded that Bonneville was entitled to prejudgment interest at six percent (6%) per annum from the 1st day of May, 1976, the date Bonneville was to receive final payment upon all other commissions.

D. Bonneville has not Waived any Claim for Commissions.

Simons asserts that because Bonneville's real estate agent, Dennis Christensen, brought an action in the federal court directly against Simons for alleged anti-trust violations, that such suit necessarily precludes the claim of Bonneville. The evidenced adduced at trial clearly shows that the releases granted were granted by Dennis Christensen, individually, and in no way purported to be a release of any claims that Bonneville may have had against Simons.

Section 61-2-18, Utah Code Annotated (1953, as amended) provides:

No person, partnership, association or corporation shall bring or maintain an action in any court of this state for the recovery of commission, a fee or compensation for any act done or service rendered the doing or rendering of which is prohibited under the provision of this act to other than licensed real estate brokers, unless such person was duly licensed hereunder as a real estate broker at the time of

the doing of such act or the rendering of such service.

As such, the claim for commissions as asserted in this action belonged to Bonneville and only to Bonneville. Because Dennis Christensen was not an agent of Bonneville for purposes of the federal court action, nor did he purport to be, nothing transpiring therein including the release granted by Dennis Christensen can be binding upon the Plaintiff Bonneville as it relates to its claim.

Even at trial, Simons simply asserted that Bonneville was precluded from recovering the amount due Christensen (Transcript 324). Certainly, such release of an individual cannot be extended to a former principal for which the former agent had no present authority.

CONCLUSION

It is a well established rule within the State of Utah that the Supreme Court will review the evidence and all inferences to be drawn from such evidence most favorable to the findings of the trier of fact. Smith vs. Gallegos, 16 Utah 2d 344, 400 P.2d 570 (1965). Upon examination of the evidence in this light, one must conclude that as a result of the contract offer made by the Defendant Dan Simons, as published in the Salt Lake Board of Realtors Multiple Listing Service, the Plaintiff became entitled to the payment of commissions totalling \$60,000.00 as a result of its efforts in finding a buyer who purchased the Fashion

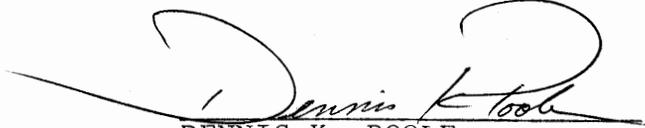
Fabrics Warehouse. The Defendant Simons agreed that this activity was significant, significant enough that the Plaintiff was paid commissions according to the commission split effective January 10, 1975, in the sum of \$40,000.00. Because the Plaintiff was precluding from changing the commission split once substantial performance had been made by Bonneville, Bonneville was entitled to judgment against the Defendant Dan Simons for the additional sum of \$20,000.00, minus \$9,000.00, the amount released by Dennis Christensen. Upon the sum of \$11,000.00, Bonneville is entitled to interest thereon at the legal rate from the date that Defendant was otherwise entitled to payment of interest.

RESPECTFULLY SUBMITTED this 12 day of October, 1982.


DENNIS K. POOLE
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 12 day of October, 1982, two copies of the foregoing Brief of Plaintiff-Respondent were hand-delivered to Parker M. Neilson and Mary Lou Godbe, 318 Kearns Building, Salt Lake City, Utah 84101, attorneys for Defendant-Appellant.


DENNIS K. POOLE