1982

Bonneville Properties, Inc. v. Dan Simons : Reply Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

BONNEVILLE PROPERTIES, INCORPORATED, a corporation,

Plaintiff-Respondent,

vs.

DAN SIMONS,

Defendant-Appellant.

No. 18223

REPLY BRIEF OF APPELLANT

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

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AUTHORITIES CITED

Appellant Simons replies to the Brief of Plaintiff-Respondent Bonneville Properties, Incorporated ("Bonneville" herein) as follows:

REPLY TO STATEMENT OF FACTS

It is axiomatic that the facts on appeal are those facts stipulated by the parties or determined by the trial court, if supported by the evidence. This Court should, therefore, be aware that the facts recited in the Brief of Appellant were a substantial restatement of the comprehensive stipulation entered at the time of trial. (See Tr. 3-19) By contrast, numerous statements advanced by Appellee as "facts" are contrary to the stipulated facts, without support in the findings of the trial judge and contrary to the evidence.

There is no finding, for example, that Bonneville "relied" on Simons' published commission. (Br. 1) The assertion that Bonneville "introducted the ultimate buyer of the warehouse to Simons" (Br. 1, 2) is contrary to the stipulated facts, the uncontroverted evidence and the findings of the trial court.*

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* The stipulated fact is that Bonneville's agent met with a representative of Jelco, Inc. (not A.K. Utah) with regard to the possibility that the Fashion Fabrics property might be used to perform the Swaner exchange agreement. (Tr. 9) Mr. Emanual A. Floor testified that Jelco had no authority to represent A.K. Utah. (Tr. 231-233) The trial court found that Bonneville introduced the "name" of A.K. Utah, but that "neither plaintiff nor its agents, L. Richard Sorensen and Dennis Christensen, represented A.K. Utah as realtors at any time." (Finding of Fact No. 11)

Bonneville would further divert the Court with argument of spurious issues to this litigation. There was no issue at trial over whether Bonneville "agreed" to any change in the commission split (Br. 1), and could not be in a claim based upon a unilateral contract. The facts, had they been the facts, that its principals and agents "met with Simons" (Br. 6) "requested to be in attendance at all negotiations" (Br. 7), "were ready and willing at all times to offer assistance" (Br. 8), or that "attorneys for A.K. Utah" had "expressed an intent to purchase" (Br. 7) are of no consequence in this case involving performance of such a contract.

The proper, and we submit, dispositive issue is that admitted at Br. 7:

> on the effective date of [Simons' change of commission split] no written agreements had been reached . . . regarding the sale of the subject property and an exchange which was to take place thereafter. (emphasis added)

Appellees do a disservice to this Court by introducing such spurious issues.

POINT I

THIS COURT HAS NEVER ADOPTED THE MINORITY POSITION CONCERNING ACCEPTANCE OF OFFERS OF UNILATERAL CONTRACTS

Bonneville candidly admits at Br. 10 that the decision below can be affirmed only if the position of RESTATEMENT, CONTRACTS § 45 is the law in Utah. That position is that an offer of a unilateral contract implies a promise not to revoke the

offer to one who has undertaken "substantial performance."

The majority of jurisdictions, including Utah, do not follow the section relied upon. They adhere, instead, to the standards of RESTATEMENT 2d, AGENCY § 447, requiring performance of all essential terms of the offer, at least in the absence of bad faith. Bonneville thus advances a minority position on unilateral contracts, never adopted in the State of Utah and which, we submit, should not be adopted in this case.

A. Reliance on the Auerbach's case is Misplaced.

Auerbach's, Inc. v. Kimball, 572 P.2d 376 (Utah 1977), despite the urging at Br. 10-11, does not adopt the minority position of RESTATEMENT, CONTRACTS § 45, either in specific terms or by reasonable inference. Neither does it reject the well established law in this jurisdiction respecting real estate brokerage contracts of, e.g., E.B. Wicks Co. v. Moyle, 103 Utah 554, 137 P2d 342 (1943). That law is the majority position of RESTATEMENT 2d, AGENCY § 447. In fact, the Auerbach's case does not even deal with the specialized problem of unilateral agreements of subagency in the real estate business.

The Auerbach's case merely held that an employee which had completed thirty-eight years of service, on a promise of a pension after thirty years service and the attainment of sixty-five years of age, could pursue a claim in quasi contract. A summary judgment dismissing the claim was accordingly reversed.

Auerbach's case addresses none of the issues herein. The question of whether an offer of subagency is "fairly and in

good faith terminated" (see Wicks, supra at 137 P.2d 345) might be an issue on different facts, but in this case even that question was stipulated out of the case. It was stipulated that Simons in fact believed that he was entitled to a 60% commission split (Tr. 11), as per the revised offer of subagency, and the trial court found it to be a fact that "Simons in changing his commission split . . . did so in good faith." (emphasis added) (Finding of Fact No. 15) Thus the "good faith" exception under the majority rule, which Auerbach's may be read as addressing, is simply not an issue herein, having been resolved against the position of Bonneville.

The law of this State pertinent to Bonneville's claim is that there is no right to a commission unless Bonneville had produced a "written, binding offer" from a "ready, willing and able buyer" agreeing to "all terms and conditions." Boyer Co. v. Lignell, 567 P.2d 1112 (Utah 1977). Measured by that standard, Bonneville in fact concedes that there can be no recovery with the following admission at page 7 of its brief:

> on the effective date of such change, no written agreements had been reached . . . regarding the sale of the subject property and an exchange which was to take place thereafter.

B. Bonneville's Claim Fails to Satisfy Even the Auerbach's Dicta.

The language quoted by Bonneville from Auerbach's, supra, is thus clear dicta, under any view. More important, even if it could be considered holding -- even if it could be

taken as modifying the reasoned majority position of e.g. Wicks, supra -- it is clear that Bonneville's claim must nevertheless fail.

That is so because the gist of the quoted dicta is that "Kimball had performed a substantial part of the performance required in Auerbach's alleged offer." Here there is no finding that Bonneville substantially performed the task of producing a written offer, by a ready, willing and able purchaser, on all of the terms specified in the offer. To the contrary, it is uncontroverted that Bonneville represented no one and produced no offer, on those or any other terms. (See tesimony of Mr. Emanuel A. Floor at Tr. 231-233) The trial judge found it to be a fact "that neither plaintiff nor its agents . . . represented A.K. Utah as realtors at any time." (Finding of Fact no. 11) Bonneville's claim is based on the sole fact that it suggested the name of a potential buyer -- something far different than the "substantial performance" this Court addressed in Auerbach's.

The trial judge never concluded that suggesting a name amounted to "substantial performance," and indeed he could not. His conclusion, rather, is that "the introduction of the purchaser's name was significant." (emphasis added) See Conclusion of Law No. 5. That is a conclusion of no consequence to the settled Utah law of e.g., Wicks, supra. It also falls short of the "substantial performance" referred to in the Auerbach's dicta.

C. Assertions of "Substantial Performance" were never Adopted by the Trial Court and are not Properly urged Herein.

Bonneville's effort to argue that it "has substantially performed," in the absence of any such finding by the trial court (see part B of Point I at Br. 12), amounts to a confession of its untenable position. Bonneville is thus required to depart from the findings of the trial court, the evidence herein, and the settled case law of this jurisdiction, and urge matters beyond the evidence and the findings which it is not the province of this Court to determine on this appeal.

It is urged in that connection that one who "sells" property is entitled to a commission (Br. 13), though it is a stipulated fact, and determined by the trial judge, that Bonneville did not "sell" the property in question.

It is further urged that Bonneville "attempted to involve itself in negotiations" (Br. 15) and that "Simons precluded Bonneville from further performing in assisting or otherwise negotiating with the respective parties." (Br. 16) The trial court made no such determinations and, to the contrary found as a fact that Bonneville represented no party to the transaction. Bonneville simply had no one to negotiate for or involve itself with and in the nature of things Simons could not "preclude" Bonneville from negotiating for clients it never had.*

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* Bonnneville apparently refers to testimony to the effect

The multiple cases cited in conjunction with that discussion -- all from other jurisdictions -- thus lack relevance to the facts of this case and their reasoning is at odds with the clear pronouncement of this Court that

> A broker is never entitled to commissions for unsuccessful efforts. The risk of a failure is wholly his. The reward comes only with his success. That is the plain contract and contemplation of the parties. The broker may devote his time and labor, and expend his money with ever so much devotion to the interests of his employer, and yet if he fails, if without effecting an agreement for accomplishing a bargain, he abandons the effort, or his authority is fairly and in good faith terminated, he gains no right to commission. E.B. Wicks Co. v. Moyle, 103 Utah 554, 137 P.2d 342 (1943).

POINT II

APPELLEES FAIL TO EXPLAIN THE PROCEDURAL ERRORS OF THE TRIAL COURT

Bonneville correctly states the law relative to amendment of pleadings and amendments to conform to the evidence. (Br. 20-22) It fails, however, to suggest any "prejudice" that would result from deciding the cause, in the spirit of modern procedure, on the facts adduced at trial rather than some technical error in plaintiff's answer authored by Simon's prior

(footnote continued)

that Dennis Christensen, Bonneville's agent, requested that Simons allow him to sit in on negotiations so that he could learn the complex and highly specialized commercial and industrial aspect of real estate. Simons replied, in substance, that he did not "baby sit," even for his own agents. Such a refusal, to one who had no client to negotiate for, was quite reasonable and, does not "preclude" Bonneville from further negotiating, had it been in a position to do so.

counsel.

The absence of the potential witness, Gary Jenkins, from the state, or Bonneville's failure to depose him, cannot justify the trial court's refusal to amend the pleadings to reflect the fact that Jenkins never represented A.K. Utah. That fact was clearly established by the evidence. Granting leave to amend could not amount to prejudice, for Simons agreed to stipulate what Jenkins' testimony would be.

On the issues of standing under Utah Code Annotated § 61-2-18 (1953), as amended (Br. 22-23) and custom and usage (Br. 23-24), Bonneville correctly states the law, again, but in that instance misstates the case. The issue is not whether Bonneville can function as a broker, but whether it or its licensee, Mr. Sorenson, is the proper party to maintain an action for a commission -- and the legislature has determined that he must.

In relation to custom and usage, the issue is not whether Simons pleaded custom and usage, but whether it is error to exclude evidence on that point in a claim asserted on an alleged agreement based upon custom and usage. (See the stipulation of the parties at Tr. 6) In that regard the rules of evidence dictate that Simons may adduce evidence pertinent to matters placed in issue by Bonneville.

It is worthy of note, further, that when the issue is "waiver" by reason of Dennis Christensen's settlement of the same claim in Federal Court, Bonneville is forced to rely

on the same bar of Utah Code Annotated § 61-2-18 (1953), as amended, that Simons invokes against it. (Br. 25-26) Plainly, Bonneville cannot have it both ways. Either the statute means what it says and Bonneville is out of court, or it doesn't and Christensen has already waived the claim.

As regards all three issues, Bonneville seeks to impose a rigidity reminiscent of the common law -- to evoke procedural booby traps which have not been condoned since the advent of modern notice pleading. The philosophy of modern procedure is that causes should be resolved according to the facts, rather than the snares a pleader may set or an unwary litigant may fall into. The error of the trial judge is that he invoked procedures which prevented the true facts from being shown, for no reasons which advanced the cause of justice. Bonneville can prevail only if the errors in pleading are exhaulted above the primary function of this and every court to decide the issues according to the facts.

In truth, Bonneville may not prevail <u>even</u> <u>if</u> the errors involved are thus exhalted.

CONCLUSION

The decision of the trial judge is supported by neither the law nor the evidence. Moreover, the findings of the trial court are in and of themselves inconsistent with the decision, as is made evident by Bonneville's finding it necessary to argue matters never determined below in an effort to justify the result.

For these reasons, and because of the multiple procedural errors explained in the Brief of Appellant, the decision below should be reversed and this action dismissed.

Respectfully submitted this 9th day of November, 1982.

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of November, 1982, I hand-delivered two (2) true and correct copies of the foregoing REPLY BRIEF OF APPELLANT to Dennis K. Poole, POOLE, CANNON & WARD, 4885 South 900 East, Suite 210, Salt Lake City, Utah, attorneys for respondent.

Kathy Curtis