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John H. Klas v. Mark O. Van Wagoner and Kathryn Van Wagoner : Reply Brief

Utah Court of Appeals

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DOCKET NO.

900493-CA

JOHN H. KLAS,

Plaintiff/Appellant,

v.

MARK O. and KATHRYN
VAN WAGONER,

Defendant/Appellees.

Case No. 900493-CA

Priority Number (16)

AN APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT OF
SALT LAKE COUNTY, THE HONORABLE RAYMOND S. UNO, DISTRICT JUDGE

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FILED

JUN 20 1991

Mary T. Noonan
Clerk of the Court
Ithaca Court of Appeals

IN THE UTAH COURT OF APPEALS

JOHN H. KLAS,)	
)	
Plaintiff/Appellant,)	
)	
v.)	
)	
MARK O. and KATHRYN)	Case No. 900493-CA
VAN WAGONER,)	
)	Priority Number (16)
Defendant/Appellees.)	

APPELLEES REPLY BRIEF ON CROSS-APPEAL

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PRELIMINARY STATEMENT

In his brief on the cross-appeal, plaintiff/appellant (hereinafter "plaintiff") does not dispute the statement of facts set forth in the brief of appellees. Appellees/defendants ("the Van Wagoners"), therefore, rely on their original statement of facts in this reply brief on the cross-appeal.

SUMMARY OF ARGUMENTS

- I. EVIDENCE MARSHALLING IS NOT REQUIRED WHEN CHALLENGING CONCLUSIONS OF LAW. CONCLUSIONS OF LAW ARE REVIEWED FOR CORRECTNESS.
- II. THE TRIAL COURT'S FINDINGS OF FACT INDICATE THAT CAROL KLAS HAD ACTUAL AUTHORITY TO ACT AS PLAINTIFF'S AGENT BECAUSE PLAINTIFF CONTROLLED THE TERMS AND MANNER OF THE SALE OF THE HOME.
- III. PLAINTIFF IS RESPONSIBLE FOR HIS AGENT'S ACTIONS. THE TRIAL COURT'S FINDINGS OF FACT INDICATE THAT CAROL KLAS WAS PLAINTIFF'S AGENT AND INDICATE THAT CAROL KLAS COMMITTED FRAUD AND/OR MADE MATERIAL MISREPRESENTATIONS.
- IV. PLAINTIFF'S CLAIM THAT THE VAN WAGONERS SHOULD HAVE DISCOVERED THE APPRAISAL CONCEALED BY CAROL KLAS IS UNREASONABLE.

ARGUMENT

- I. PLAINTIFF MISCONSTRUES THE STANDARD OF REVIEW FOR CONCLUSIONS OF LAW.

Plaintiff erroneously asserts that the Van Wagoners have

not marshalled the evidence as part of their cross-appeal. Plaintiff's point would be valid if the Van Wagoners were challenging findings of fact (as plaintiff is on his appeal). The Van Wagoners, however, are challenging conclusions of law. Specifically, the Van Wagoners claim that given the trial court's findings of fact, the trial court should have concluded, as a matter of law, that:

1. Carol Klas was plaintiff's agent; and
2. Plaintiff was bound by his agent's fraud and/or misrepresentations.

As the Utah Supreme Court has pointed out, conclusions of law are afforded no deference, but are reviewed for correctness. State v. Rio Vista Oil, Ltd., 786 P.2d 1343 (Utah 1990); Saunders v. Sharp, 806 P.2d 198 (Utah 1991). The Van Wagoners contend that the Trial Court's conclusions of law are incorrect.

II. THE RECORD SUPPORTS A CONCLUSION THAT CAROL KLAS WAS PLAINTIFF'S AGENT.

A. Defendants provided citations to the record.

The predominant theme of plaintiff's response brief is the alleged failure of the Van Wagoners to support their argument with citations to the record. The van Wagoners did

cite the record, but specifically relied on the court's findings of fact.

Plaintiff contends that the Van Wagoners have not cited "a single finding by the Court, point of authority, nor a single reference to the transcript that evidences the existence of an agency relationship." (Plaintiff's Reply Brief at p.25). To maintain that argument, plaintiff simply ignores the Van Wagoners' citation to the trial court's findings of fact regarding plaintiff's ownership of the property in question in fee simple. (Amended Findings of Fact Nos. 2 and 4, record p.238, Brief of Appellees at p.27). Plaintiff also ignores the Van Wagoners' citation to the testimony of Carol Klas which indicates that plaintiff controlled the manner in which the home was sold: "[plaintiff] gave me some guidelines to follow. We drew up an add. I primarily wrote the add. He reviewed it and said it would be acceptable to him." (Transcript, Vol. II, p.83, L.16-21; Brief of Appellees, Appendix p.3). These references support defendants' contention that plaintiff controlled the process for the disposition of the home.

Plaintiff also contends that he had no control over the asking price for his home. (Plaintiff's Reply Brief at p.26 ("he didn't even set the sales price".)) While plaintiff may not have set the sales price, he certainly controlled the

asking price and valuation of the home. Indeed, the divorce decree upon which plaintiff relies as the source of Carol Klas' authority to sell the home specifically states "if defendant [Carol] finds a buyer who is willing and able and ready to purchase the [home in question] at a price and upon terms acceptable to the plaintiff, the plaintiff shall pay to [Carol a finder's fee]." (Finding of Fact No. 4; transcript Vol. I, at p.8, L.2-11; Brief of Appellees, Appendix p.3). (Emphasis added). Clearly, plaintiff controlled the price and terms upon which the home would be sold.

Plaintiff's brief invites error because it suggests an erroneous standard of review for the challenge to the court's conclusions of law and because it ignores both the court's findings of fact and the Van Wagoners' reliance on these findings.

B. The record supports a conclusion of agency.

It is true that the trial court made no specific conclusion of law that Carol Klas was plaintiff's agent. Perhaps the point was too obvious. Nonetheless, the findings of fact do support a conclusion of agency:

1. Plaintiff owned the home in fee simple. (Finding of Fact No. 2).

2. The home was offered for sale subject to the terms of the divorce decree. (Finding of Fact No. 3).
3. The divorce decree permitted Carol Klas to sell the home, but required the sale to be on terms and at a price acceptable to plaintiff.
4. Carol Klas undertook the marketing of the home pursuant to the terms of the divorce decree. (Finding of Fact No. 4).
5. Plaintiff, not Carol Klas, acquired appraisals on the home. (Finding of Fact No. 5).
6. Carol Klas represented to defendants that appraisals had been made. (Finding of Fact No. 7).

Carol Klas had actual authority to sell the home for plaintiff. As plaintiff has pointed out,

In general, the determinative question has usually been posed as one of "control", the view being that if the defendant controls, or has the right of control, the manner in which the operations are to be carried out, the defendant is liable as a master. . . . Foster v. Steed, 432 P.2d 60, 62 (Utah 1967).

The trial court's findings of fact listed above demonstrate that plaintiff had such control. Thus, Carol Klas was acting as plaintiff's agent.

III. BASED UPON THE FINDINGS OF FACT, THE TRIAL COURT SHOULD HAVE CONCLUDED THAT PLAINTIFF WAS RESPONSIBLE FOR THE FRAUD AND/OR MISREPRESENTATIONS OF HIS AGENT.

Plaintiff's second and third points correctly note that the Van Wagoners' claims of fraud and misrepresentation against plaintiff are based upon plaintiff's responsibility for the fraud and/or misrepresentation of his agent, Carol Klas. Indeed, defendants never have claimed otherwise.

Once again however, Plaintiff attempts to sustain his arguments by ignoring the trial court's findings of fact and requesting this court to accept plaintiff's argumentative interpretation. For example, plaintiff argues that "there is a serious question as to how important the appraisal information really was," (plaintiff's Reply Brief at p.28). The trial court specifically found that the appraisal was important; it would have made a material difference to the defendants had it been disclosed. (Finding of Fact No. 30; record at p.305).

Plaintiff also ignores the trial court's specific findings as follows:

1. The Van Wagoners asked Carol Klas about the existence of appraisals on the home. (Finding of Fact No. 30; record at p.305).
2. The Van Wagoners based their offer on the representations made by Carol Klas. (Finding of Fact No. 31; record at p.305-06).

3. Carol Klas withheld a lower appraisal on the value of the home. (Finding of Fact No. 30; record at p.305).
4. That lower appraisal would have made a material difference in the Van Wagoner's offer to buy the home. (Finding of Fact No. 30; record at p.305).

Plaintiff's argument that the trial court should have found facts differently is irrelevant to the point at issue. The point is that the trial court should have concluded, as a matter of law, that plaintiff was responsible for his agent's fraud and/or misrepresentations given its own findings of fact.

IV. PLAINTIFF WOULD HAVE THIS COURT ADOPT AN UNREASONABLE STANDARD FOR RELIANCE.

Plaintiff argues that the Van Wagoners' inquiry into the existence of appraisals "does not measure up to the [reliance] standard required by the court." (Plaintiff's Reply Brief at p.30). Plaintiff claims that the Van Wagoners did not take reasonable steps to inform themselves as to the appraisal values. Id. The argument attempts again to recharacterize the trial court's findings of reasonable reliance.

According to plaintiff, it was the Van Wagoners' duty to discover if Carol Klas had failed to disclose appraisals after the Van Wagoners had specifically asked her for a disclosure.

The argument posits the absurd duty to undertake a global search to verify whether Carol Klas had disclosed information in her possession in response to a specific request. The so-called duty is all the more ludicrous in this case since Carol Klas did disclose the existence of three appraisals; she just withheld all information and reference to the one legitimate appraisal in the group because it did not support a higher purchase price. Put in the rhetorical question form, how could the Van Wagoners have discovered let alone known to look for the missing appraisal given Carol Klas' representations. The Van Wagoners justifiably relied on her honesty and her duty to respond truthfully as to the existence of appraisals and to what the appraisals indicated. Unfortunately, Carol Klas did not disclose an unfavorable, material appraisal. There is nothing the Van Wagoners could have done to discover this undisclosed appraisal.

Plaintiff's opinion that the additional appraisal "would not seem to make any difference" is irrelevant. Again, the trial court specifically found that the additional appraisal would have made a material difference in the Van Wagoners' decision to make an offer on the home. (Finding of Fact No. 30; record at p.305).

V. CONCLUSION.

The Van Wagoners respectfully request that this court reverse the trial court's dismissal of the Van Wagoners' counterclaim for fraud as John Klas, through his agent Carol Klas, clearly had a duty to speak when asked about appraisals, and the omission to disclose the one material appraisal constituted fraud and/or a material misrepresentation.

The Van Wagoners respectfully request that the court enter judgment on the counterclaim and remand that part of the case for a finding on the issue of the Van Wagoners' damages.

DATED: June 20, 1991

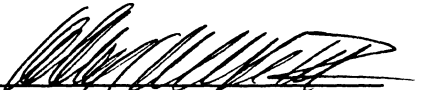
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CERTIFICATE OF SERVICE

I hereby certify that I mailed a true and correct copy of the foregoing **APPELLEES REPLY BRIEF ON CROSS-APPEAL** this 20th day of June, 1991, with postage prepaid and addressed to:

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