

1990

Giles H. Florence v. S.N.L. Financial Corporation, and George Quist : Brief of Appellee

Utah Court of Appeals

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900533CA

IN THE UTAH COURT OF APPEALS

GILES H. FLORENCE,

Plaintiff/Appellant,

vs.

S.N.L. FINANCIAL CORPORATION,
and GEORGE QUIST,

Defendants/Appellees.

:
:
: **BRIEF OF THE**
: **APPELLEES**
:
: Case No. 900533-CA
:
: Priority
: Classification
: No. 16
:

**APPEAL FROM SUMMARY JUDGMENT GRANTED BY THIRD
JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY,
JUDGE HOMER F. WILKINSON**

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Attorneys for Appellees

FILED

MAY 23 1991

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	:	
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	:	APPELLEES
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STATEMENT OF JURISDICTION

Defendants George Quist ("Quist") and S.N.L. Financial Corporation ("SNL") agree with the Statement of Jurisdiction provided by Plaintiff Giles H. Florence ("Florence"). In further support thereof, Defendants note that the Summary Judgment from which this Appeal was taken, was entered by the Honorable Homer F. Wilkinson of the Third District Court in and for Salt Lake County, State of Utah on May 30, 1990. Florence's Notice of Appeal was timely filed on June 14, 1990. Record at 000101.

STATEMENT OF THE ISSUES

Defendants disagree with Plaintiff's Statement of Issues and Standard of Review (Brief at pp. 1-3) and submit that the sole issue presented by this Appeal can be succinctly distilled to the following:

Whether the Lower Court Erred in Granting Defendants' Motion for Summary Judgment?

Inherently contained within this issue are the following sub-issues:

- A. Did the trial court properly construe the Letter and the Release, both dated May 31, 1984, in its determination that the release became effective releasing Defendants from any liability for payment of a commission?
- B. In construing the April 22, 1983 Letter, did the Trial Court properly determine that

Plaintiff was not entitled to any brokerage commission?

C. In so construing the documents, was there any issue of fact, both material and necessary to the decision, which was truly placed in dispute, by the submissions made to the lower court?

Defendants submit that the correct Standard of Review is as follows:

In considering an appeal from a grant of summary judgment, the Appellate Court views the facts in a light most favorable to the losing party below. And in determining whether those facts require as a matter of law, the entry of judgment for the prevailing party below, the Appellate Court gives no deference to the Trial Court's Conclusions of Law which are reviewed for correctness. Blue Cross & Blue Shield v. State, 779 P.2d 634 (Utah 1989).

DETERMINATIVE PROVISIONS

Defendants submit that the interpretation of the following Statutes and Rules are determinative:

1) Utah Code Ann. § 61-2-2(8), (1953, as amended) (Addendum F).

2) Utah Code Ann. § 61-2-18, (1953, as amended) (Addendum F).

3) Rule 56, Utah Rules of Civil Procedure (Addendum F).

STATEMENT OF THE CASE

A. Nature of the Case.

On April 19, 1985, Florence filed a Complaint against SNL and Quist, initiating the underlying action which culminated in this appeal. Florence's Complaint alleges that SNL and Quist are in breach of a contract to pay him a commission. (Record at 00004).

B. The Course of Proceedings.

Defendants filed a Motion for Summary Judgment, requesting dismissal of Plaintiff's Complaint. Counsel for both parties submitted memoranda to and participated in oral argument on Defendants' Motion before Judge Wilkinson. The Trial Court granted Defendants' Motion for Summary Judgment.

C. Disposition at Trial Court.

Defendants dispute the claim of ambiguities contained in Plaintiff's statement of the case. The Trial Court did not determine that there were any ambiguities. (Record at 00107, pp. 1-7, Addendum E). The Court granted Defendants' Motion and determined as a matter of law that the Letter and Release both dated May 31, 1984 were effective, thereby releasing Defendants from any liability for payment of a commission. (Record at 00107, p. 2, Addendum E).

Although not necessary to its decision, the Court further determined as a matter of law that the handwritten letter of April 22, 1983 was insufficient to entitle Plaintiff to receive a commission. (Record at 00107, p. 4, Addendum E).

STATEMENT OF FACTS

Defendants dispute Plaintiff's Statement of Facts (Brief at pp. 3-6) and submit that the undisputed facts are as follows:

1. During 1982, David B. Johnson, who owned approximately 62% of Security International Corporation, was seeking a buyer or merger candidate for his interest. Security International Corporation was a holding company which owned 100% of the stock of Security International Insurance Company. Johnson Deposition (4-30-90) at pp. 11-12, Addendum A).

2. On January 27, 1983, Plaintiff Giles Florence, called Mr. Johnson on the telephone from Hawaii. During the course of their conversation, Mr. Johnson related that he was possibly interested in a merger candidate if Mr. Florence knew of anyone who could possibly fit into the Security International Insurance Company organization. Johnson Deposition (4-30-90) at p. 14, Addendum A.

3. Thereafter, Florence and Johnson entered into

an option to purchase or sell. Johnson Deposition (4-30-90) at pp. 16-18, Addendum A.

4. On or about April 22, 1983, Defendant George Quist as President of Defendant SNL submitted through Plaintiff a preliminary handwritten offer to purchase Johnson's interest in Security International Corporation. Record at 00080, Addendum B.

5. Following receipt of the April 22, 1983, handwritten offer by Johnson, a series of correspondence, proposals and counter-proposals were exchanged between the Defendants and the proposed Seller, or their respective counsel, relating to Defendant SNL's purchase of Johnson's interest in Security International Corporation. Johnson Deposition (4-30-90) at p. 26, Addendum A.

6. On May 31, 1984, the parties met in the office of Mr. Johnson's attorney in North Dakota. Mr. Florence was also present. At that time, a letter agreement was executed by Defendant Quist, as President of Defendant SNL which set forth certain payments to be made to GH3 National Corporation "after closing of the transaction whereby Security International Insurance Company is acquired by SNL Financial Corporation." Record at 00044, Addendum C.

7. Concurrent therewith and "in consideration of" the letter of the same date from Defendant George R.

Quist, President of Defendant SNL Financial Corporation, Plaintiff Giles Florence executed a release and discharge of all liability of Defendants SNL, Quist, and additional entities named therein. Record at 00046, Addendum D.

8. The following day, on June 1, 1984, Defendant SNL, through its president Defendant Quist, reached an impasse with Johnson regarding the purchase of Johnson's interest in Security International Corporation.

9. Thereafter, up through June 28, 1984, Florence continued to make efforts to produce a buyer for Johnson's interest in SIC. Johnson Deposition, (4-30-90) at p. 118, Addendum A.

10. On June 28, 1984, Johnson received an offer from a third party to purchase Johnson's interest in SIC, which offer was accepted; and the transaction was closed on October 10, 1984. Johnson Deposition (4-30-90) at p. 119, Addendum A.

11. On July 19, 1984, Plaintiff Florence and Johnson and the latter's corporations executed mutual releases each to the other. Addendum G.

12. The transaction described in the May 31, 1984 letter of Defendant Quist to GH3 National Corporation was never concluded and the sale of Johnson's interest to Defendant SNL referred to therein never closed and no commission was paid by Defendants.

13. Before trial, Defendants filed a Motion for Summary Judgment of Dismissal, which motion was granted by the Honorable Homer F. Wilkinson, District Judge. Record at 00035 and 00097-98.

SUMMARY OF ARGUMENT

No facts were presented to the Trial Court that Plaintiff was entitled to any commission. In fact, the undisputed evidence as contained in the May 31, 1984 Letter and Release demonstrate that Plaintiff expressly agreed that any, would be paid to a third party, who is not a party to the instant action. Even assuming arguendo that a commission became owing, it was not owing to Plaintiff. In addition, the lower court was not presented with any evidence that Plaintiff was, or is, a licensed real estate broker. Under such circumstances, Plaintiff is precluded from maintaining the instant action against these Defendants, pursuant to Utah Code Annotated § 61-2-18, (1953, as amended) (Addendum F).

The undisputed evidence showed that the April 22, 1983 handwritten letter was superseded through various exchanges, proposals and counter-offers and that the May 31, 1984 Letter and Release constituted the final agreement between the parties. The court further correctly determined that the approval of the May 31, 1984 letter by attorney, Joseph L. Henriod had no

bearing whatsoever as far as the situation was concerned between the parties. Therefore, the May 31, 1984 letter was not invalid for failure of a condition precedent, and the Release was effective, thereby releasing Defendants from any liability for payment of a commission.

Finally, the Trial Court correctly determined that the April 22, 1983 Letter was insufficient under the Statute of Frauds, even assuming that said Letter was applicable.

ARGUMENT

I.

PLAINTIFF IS NOT ENTITLED TO ANY COMMISSION.

A. No Commission Was to be Paid Plaintiff.

No evidence exists that Plaintiff is entitled to any commission. In fact, the only evidence before the Trial Court demonstrates that a third party, and not Plaintiff, was to receive a commission, if any. The May 31, 1984 Letter and Release expressly states that the commission, if any became owing, was to be paid to GH3, a corporation. GH3 is not a party to this action.

B. Plaintiff is Not a Licensed Broker.

Plaintiff has argued extensively that he is entitled to a "brokerage" fee or a commission because he brought a willing seller and a willing buyer together involving a sale of real property. However, there is

neither any allegation in Plaintiff's Complaint nor any evidence before the Court that Plaintiff was or is a licensed broker. Utah Code Annotated § 61-2-18, (1953, as amended) (Addendum F) prohibits any action, such as the instant one, for the recovery of any commission, which is brought by anyone other than a licensed broker. Therefore, should this Court determine that the transaction complained of involved real estate as defined by Utah Code Ann. § 61-2-2(8), 1953, as amended) (Addendum F), Plaintiff would not be entitled to recover.

C. Statute of Frauds.

This Court has held that the Statute of Frauds applies to "agreements requiring compensation for brokering real estate, including finder's agreement...." Machan Hampshire v. Western Real Estate, 779 P.2d 230, 234 (Utah Ct. App. 1989). It has further held that "a broker must allege and prove an express written contract to recover a commission." Id. Finally, this Court held, in C.J. Realty, Inc. v. Willey, 758 P.2d 923, 928 (Utah Ct. App. 1988), that in order for a brokerage agreement or contract to satisfy the Statute of Frauds, it must include the following critical terms:

- 1) It must identify the finder;
- 2) It must identify the finder's client;

3) It must identify the property owner who will owe a commission to the finder if the transaction is closed with the finder's client; and

4) It must identify the finder's commission rate.

Neither the May 31, 1984 Letter and Release, nor the April 22, 1983 letter (assuming it were applicable), contains the critical terms necessary to satisfy the Statute of Frauds. Therefore, the lower court's determination that the Statute of Frauds applies to the transaction at issue is correct. (Record at 00107, pp. 4-5) (Addendum E).

Since Plaintiff is not a licensed broker and since neither of the written agreements between the parties satisfies the Statute of Frauds, this Court should affirm the Order of Summary Judgment granted below.

II.

NO COMMISSION IS DUE BY VIRTUE OF THE MAY 31, 1984 LETTER AND RELEASE.

A. The April 22, 1983 Letter was Superseded by the May 31, 1984 Letter and Release.

In Verhoef v. Aston, 740 P.2d 1342, 1344 (Utah Ct. App. 1987), this Court held that "contracts should be construed so as to give effect to the parties' intentions, and such intent should be determined, if possible, by examining the written Agreement executed by the parties." (citing Atlas Corp. v. Clovis National

Bank, 737 P.2d 225, 229 (Utah 1987)). When agreements are executed "substantially contemporaneously and are clearly interrelated, they must be construed as a whole and harmonized, if possible." Atlas Corp. v. Clovis National Bank, at 229.

In this case, it is undisputed that subsequent to the letter dated April 22, 1983, a series of correspondence, proposals and counter-proposals were exchanged between the Defendants and Seller, or their counsel, relating to SNL's purchase of Johnson's interest in SIC. It is further undisputed that the May 31, 1984 Letter and Release, which were executed in conjunction with each other, were intended to be and did in fact constitute the final agreement between the parties. As such, all prior negotiations and agreements, including the April 22, 1983 letter, merged into the May 31, 1984 Letter and Release which must be construed as a whole. See Verhoef v. Aston, at 1344 ("A basic tenet of contract law is that prior negotiations and agreements merge into the final written agreement on the subject.")

Based upon the undisputed facts, Defendants submit that the Trial Court correctly determined, as a matter of law, that the parties reduced their final agreement to the Letter and the Release, both dated May 31, 1984. (Record at 00107, p. 5) (Addendum E).

B. The Letter Conditioned Payment of a Commission Upon Closing.

The right to the receipt of a commission can be waived, (White v. Fox, 665 P.2d 1297, 1302 (Utah 1983)), or conditioned upon the buyer's performance Robert Langston, Ltd. v. McQuarrie, 741 P.2d 554, 558 (Utah Ct. App. 1987). As such there is no absolute right to a commission.

In this case, the May 31, 1984 letter specifically conditions the payment of any commission upon the transaction closing. Therefore, the Trial Court correctly determined, as a matter of law, that no commission was due inasmuch as the closing never occurred. (Record at 00107, pp. 2-3, 5-6) (Addendum E).

C. The May 31, 1984 Release is Effective and is Not Defeated by Plaintiff's Allegation of a Failure of a Condition Precedent.

As his only defense to the May 31, 1984 Release, which he executed, Plaintiff alleges that it did not take effect because the May 31, 1984 Letter was to have been approved by attorney, Joseph L. Henriod. However, Mr. Henriod's approval of the Letter had no bearing whatsoever on the transaction contemplated between Plaintiff and Defendants which was dealing with an entirely separate issue, did not form an essential part

of the bargain and had nothing to do with the Release becoming effective. Rather, the clause was inserted to ensure that the Court's Order in Florence's divorce proceeding was complied with.

In addition, Plaintiff's allegation is not well founded in law. Plaintiff, at page 24 of his Brief, has cited Welch Transfer and Storage, Inc. v. Oldham, 663 P.2d 73 (Utah 1983), in support of his position. However, his reliance on Welch is misplaced. In Welch, the Plaintiff brought an action for breach of a contract to exchange real properties on the condition that the Small Business Administration approve reciprocal assumption by each party of the Small Business Administration loan to the other. When the reciprocal assumption was not accomplished, the Trial Court concluded that the contract could not be enforced due to failure of mutual conditions. Welch at 76. On appeal, the Court did not conclude that no contract existed, as Plaintiff argues, but held that "the contract expired by its own terms." Id.

Here there was no necessity for any action by Mr. Henriod, because the transaction never closed.

Plaintiff has not, nor can he demonstrate any prejudice which he may have suffered as a result of Mr. Henriod's not reviewing the letter, although an argument might be made that Mr. Henriod's failure to disapprove

the letter was tantamount to at least tacit approval of the same.

III.

ALLEGED AMBIGUITY OF THE APRIL 22, 1983 LETTER.

Finally, beginning at page 9 of his Brief, Plaintiff alleges that the lower court determined the April 22, 1983, Letter to be ambiguous as a matter of law. Such an allegation is completely false and is a gross misrepresentation of Judge Wilkinson's ruling. (Record at 00107, pp. 1-6) (Addendum E). The court never found or held that the April 22, 1983, Letter was ambiguous. Indeed, the transcript of the Judge's bench ruling (Record at 00107) (Addendum E) is void of any reference to any ambiguity. Rather, the trial court found that the April 22, 1983, Letter was insufficient as a brokerage agreement to satisfy that a commission would be paid under the Statute of Frauds, and that essential terms for the payment of a commission were missing. (Record at 00107 pp. 4-5) (Addendum E).


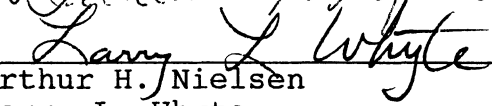
Plaintiff has apparently attempted to create an issue of ambiguity in hopes of using the parol evidence rule to defeat Defendants' Motion for Summary Judgment. However, "parol evidence will not be considered in construing a contract unless there is ambiguity in the final document and other contemporaneous writings on the same subject." Verhoef v. Aston, at 1344. There being

no evidence of any ambiguity, all of Plaintiff's arguments relative thereto must fail.

CONCLUSION

Defendants submit that the undisputed facts demonstrate that Plaintiff is not entitled to prevail on this appeal. There is no issue of material fact on which a trial is necessary and Defendants were and are entitled to judgment as a matter of law. Therefore, this Court should affirm the Trial Court's Order Granting Summary Judgment against Plaintiff and in favor of Defendants.

RESPECTFULLY SUBMITTED this 23rd day of May, 1991.

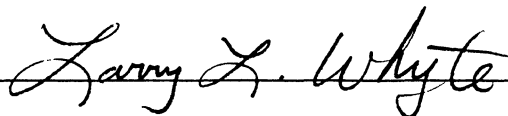



Arthur H. Nielsen
Larry L. Whyte
of Nielsen & Senior, P.C.
Counsel for Appellees

CERTIFICATE OF DELIVERY

I hereby certify that pursuant to Rule 26(b), Utah Rules of Appellate Procedure, I caused to be delivered four (4) copies of the foregoing BRIEF OF THE APPELLEES, this 23rd day of May, 1991, to the following:

Anthony M. Thurber, Esq.
Suite 735, Judge Building
8 East Broadway
Salt Lake City, Utah 84111



ADDENDUM

ADDENDUM

CONTENTS

- A. David Johnson Deposition, pp. 11-12, 14, 16-18, 26, 118 and 119
- B. April 22, 1983 Letter
- C. May 31, 1984 Letter
- D. May 31, 1984 Release
- E. Transcript of Judge Homer F. Wilkinson's Bench Ruling
- F. Section 61-2-2(8), U.C.A. (1953, as amended)
Section 61-2-18, U.C.A. (1953, as amended)
Rule 56, Utah Rules of Civil Procedure
- G. Exhibit 8 to David B. Johnson's Deposition

ADDENDUM A

1 IN THE DISTRICT COURT
2 OF THE THIRD JUDICIAL DISTRICT
3 IN AND FOR THE COUNTY OF SALT LAKE
4 STATE OF UTAH

5 -- -- -- -- --
6 GILES FLORENCE,

7 Plaintiff,

8 vs.

9 Civil No. 850902501 CV

10 S.N.L. FINANCIAL CORPORATION,
11 GEORGE QUIST,

12 Defendants.
13 -- -- -- -- --

14 D E P O S I T I O N

15 OF

16 DAVID B. JOHNSON

17 April 30, 1990

18 10:00 o'clock, a.m.

19 Taken at:
20 Offices of VOGEL, BRANTNER, KELLY,
21 KNUTSON, WEIR & BYE, LTD.
22 502 First Avenue North
23 Fargo, North Dakota

24 REPORTER: LISA SICKLER, RPR

25 (PURSUANT TO NOTICE)

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COUNSEL FOR DEFENDANTS

Also present: Kermit Bye
Giles Florence

1 had a contract that called ~~for renewal~~ for
2 renewals.

3 Q. And were those contracts calling
4 for renewals to agents who had done the
5 production obligations of Security
6 International Insurance Company that existed
7 regardless of changes of the ownership of the
8 company?

9 A. Yes.

10 Q. Did there come a time during 1982
11 or 1983 that you decided upon seeking a buyer
12 for your position?

13 A. A buyer or a merger candidate,
14 yes.

15 Q. Were there reasons that you made
16 that decision?

17 A. Yes.

18 Q. What were they?

19 A. I had felt that the insurance
20 industry had been in the decade or more of
21 change and that we didn't have the resources
22 or the management to truly expand the company
23 as I would have liked to expand it and I
24 thought we needed assistance or help in that
25 endeavor.

1 Q. Did the health condition of your
2 wife have any play, any role in that?

3 A. Yes, that was another reason.

4 Q. In any event, by the year,
5 sometime during the year 1982 had you made
6 that decision to seek a buyer or merger?

7 A. Yes, yes.

8 Q. Was there other change in the
9 deposit or surplus requirements in Minnesota
10 that played any role in your decision?

11 A. That was one of the reasons also.
12 Minnesota had dramatically increased its
13 capital and surplus requirements and although
14 Security International Insurance Company had
15 been profitable several years prior to this
16 increase or the mandatory increase deadline
17 date, we were still far short of the new
18 requirements because of the dramatic increase
19 in the demands of the state of Minnesota.

20 Q. So were you faced with the
21 necessity of raising some additional surplus
22 or making a deposit in Minnesota by a certain
23 date as a condition?

24 A. Conditional capital and surplus,
25 that's correct.

1 references. And on January 27, 1983 Giles
2 Florence who had been active in merger work
3 called me from Hawaii. And during the course
4 of the conversation I related that I was
5 possibly interested in a merger candidate if
6 he knew of anyone who could possibly fit into
7 Security International Insurance Company.

8 Q. By that time had you determined
9 what price would be acceptable for your
10 position?

11 A. Well, Buchanan had given us a
12 formula that came up with a ball park
13 figure. It really boiled down to the capital
14 and surplus and mandatory security valuation
15 reserves ~~or~~ ^{and} plus a price or value for the
16 business. And so we had a general idea of
17 what the company was worth and could be sold
18 to about anyone in the market for a, what we
19 considered a well-run company.

20 Q. For a profitable life insurance
21 company at that time was there more than one
22 buyer out at the marketplace?

23 A. Oh, yes, there were numerous
24 buyers throughout the country that would be
25 interested in buying ours.

1 what's been marked Exhibit 1 and ask if you
2 can identify that.

3 A. Yes, this is the agreement that I
4 had with Mr. Florence.

5 Q. All right. It's not too legible
6 so I will read along and you correct me if I
7 misread any of this, will you, please?

8 A. Yes.

9 Q. The caption appears to be option
10 to purchase or sell. For \$10 and other
11 valuable consideration --

12 MR. NIELSEN: Objection. Can you
13 start with the, apparently what appears to be
14 a date I can't read.

15 Q. (BY MR. THURBER) The date, what
16 does the date appear to be?

17 A. It's cut off on the top of this
18 also. It looks, however, like April. I
19 can't tell what the next number is, 19, I
20 believe it says '82, but it's really --

21 MR. FLORENCE: That's right.
22 It's 1982. But I don't know the date
23 there. Is it 1?

24 MR. THURBER: Let's let David
25 testify.

1 A. I can't tell by the --

2 Q. (BY MR. THURBER) April
3 something.

4 A. That is correct. It looks like
5 April 1 or 9th or something in 1982.

6 Q. Okay. And then is the following,
7 the text of this document. "For \$10 and
8 other valuable consideration the undersigned
9 grants this option to Giles H. Florence to
10 buy my control of SIC, a holding company,
11 which owns 100 percent of SIIC, statements
12 attached.

13 The undersigned will accept
14 \$2,800,000 cash or a reasonable figure above
15 this cash figure or a payout with the right
16 buyer.

17 It is the intention of the seller
18 to have you raise \$1,000,000 new capital for
19 SIIC at the request of Minnesota Insurance
20 Department new rules for capital
21 requirements. This will enable us to expand
22 our bank insurance business. However, I will
23 accept a qualified sale for my control.

24 This option expires upon sale and
25 closing. In witness thereof, the parties

1 have executed and delivered this agreement on
2 the day and year first above written.
3 Signed acceptable to Giles H. Florence and as
4 seller Security International Corporation by
5 yourself as president." Is that what it
6 says?

7 A. Yes.

8 Q. And was that your agreement at
9 that time?

10 A. Yes.

11 MR. NIELSEN: What about the
12 notation in the lower right-hand corner.
13 Would you mind asking Mr. Johnson if that is
14 part of the agreement?

15 A. I can't read that.

16 MR. THURBER: Let's go off the
17 record for a moment.

18 (Discussion held off the record.)

19 A. No, I don't.

20 Q. (BY MR. THURBER) The question was
21 are you aware of that tiny notation in the
22 lower right-hand corner being on the
23 original?

24 A. No. I can't read it and I don't
25 recall it.

1 Q. (BY MR. THURBER) Was there ever
2 any consideration or agreement on your part
3 to pay as commission anything to Mr. Florence
4 or his company for efforts in putting
5 together a sale?

6 A. No. I was clear with Mr. Florence
7 that any fees that he expected to receive
8 were to come from the buyer.

9 Q. And was that so from the very
10 beginning?

11 A. Yes.

12 Q. Following your receipt of the
13 handwritten proposal that appears as Exhibit
14 2, did there follow a series of exchanges of
15 correspondence and proposals and
16 counterproposals that finally resulted in an
17 agreement?

18 A. Yes.

19 Q. And did those exchanges include
20 what appears in Exhibit 3 which is actually
21 two items of correspondence on S.N.L.
22 Financial letterhead April 25 and May 11,
23 1983?

24 MR. NIELSEN: Just a moment before
25 you answer. Just let me check. My Exhibit

1 anything.

2 Q. Have you ever asked?

3 A. I haven't asked for anything.

4 Q. Do you have any expectation?

5 A. Well, if I am asked to go to trial
6 out in Salt Lake City, I would expect
7 expenses, but I truly doubt whether I could
8 leave Fargo with the condition of my wife.

9 Q. Beyond expenses, actual
10 out-of-pocket expenses do you require
11 anything?

12 A. No.

13 Q. Is it true -- well, let me ask it
14 this way, did Mr. Florence continue even
15 after the failure of the Quist transaction to
16 close, did Mr. Florence continue to make
17 efforts to produce a buyer?

18 A. Yes.

19 Q. But the buyer who was produced and
20 who finally did close was not one produced by
21 Mr. Florence?

22 A. He was not, yes.

23 Q. How long after the failure of the
24 Quist transaction on June 1, 1984 was it that
25 you reached agreement with the new buyer?

1 A. They made an offer on June 28,
2 1984.

3 Q. And was the transaction closed on
4 the terms of the offer?

5 A. It was, yes. And that was
6 concluded on October 10 of '84 because a new
7 hearing was necessitated in Bismarck, North
8 Dakota.

9 Q. So when you made the agreement or
10 signed the agreement that's marked Exhibit 8
11 with Mr. Florence on July 19 of 1984, did you
12 know at that time that you had a sale to the
13 new buyer?

14 A. What agreement was that?

15 Q. That's the Exhibit 8 agreement
16 regarding Mr. Florence's costs and
17 expenses.

18 A. Well, I certainly would have known
19 that and Giles also knew we had made another
20 agreement.

21 Q. And had you informed Giles of the
22 new agreement you made with the new buyer?

23 A. Yes.

24 Q. And did you tell him to just
25 discontinue his efforts to find another

ADDENDUM B

Giles Florence;

Subject to the approval of Security National Life Board of Directors, availability of cash to fund the initial payment & subject to regulatory approval, liquidation of the insurance in force and the assets of subject company S. N. L. Financial will pay for 6 1/2% more or less for Security International to operate the following.

- 1) Building located at 5636 Ave. Phoenix Arizona
\$450,000
- 2) Land covered Security International Books
52 + 26 acres
\$400,000
- 3) Building lot located in
Salem Arizona + Arizona City
\$80,000
- 4) 7 acres and home in Washington D.C.
\$150,000
- 5) \$200,000.00 cash
- 6) \$2,270,000.00 Payment of \$160,000.00 annually commencing on the 1st of Jan after closing of the contract & continuing for 9 (nine) additional years and balance payment 11th year of \$620,000
- 7) \$200,000.00 annuity (immediate monthly payments of cash and...

Subject to inspection of office buildings and Washington D.C. and 7 acres and...

ADDENDUM C

May 31, 1984

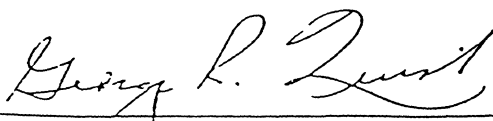
SN3 National Corporation
4920 Paradise Road
Las Vegas, Nevada 89119

Gentlemen:

Upon the closing of the transaction described below, S.N.L. Financial Corporation agrees to pay your company \$50,000, cash plus \$2,500 a month for fifty (50) consecutive months commencing 31 days after closing of the transaction whereby Security International Insurance Company is acquired by S.N.L. Financial Corporation. The \$50,000 is to be paid at the closing of said transaction. Such payment shall be in full satisfaction of any and all claims of any kind or nature whether arising before or after the date hereof against S.N.L. Financial Corporation, Security National Life, Security Holding Corporation, Security International Corporation, Security International Insurance Company, Northwest Sales Co., George Quist or David Johnson.

This agreement is subject to approval of Mr. Joseph Henroid of the law firm of Nielson and Senior of Salt Lake City, Utah, particularly in regard to that certain court order of approximately October, 1983, regarding the divorce of Giles H. and Ululani Florence.

S.N.L. Financial Corporation



George R. Quist
President

00011



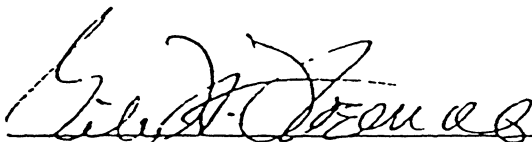
ADDENDUM D

RELEASE

I, Giles H. Florence, in consideration of a letter dated May 31, 1984, from Mr. George R. Quist, President of S.N.L. Financial Corporation, hereby agree to release and forever discharge all of the following corporations and persons from any further liability relating to the matters described in the letter referred to herein:

S.N.L. Financial Corporation
Security National Life
Security Holding Corporation
Security International Corporation
Security International Insurance Company
Northwest Sales Co.
George R. Quist
David Johnson

This release is given this 31st day of May, 1984.



Giles H. Florence

600-13



ADDENDUM E

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
THIRD Judicial District

* * *

MAY 31 1990

GILES FLORENCE, :
Plaintiff, : Case No. 850902501
v. : Transcript of:
S.N.L. FINANCIAL CORP., : JUDGE'S BENCH RULING
Defendant. : on MOTION FOR SUMMARY
: JUDGMENT

* * *

BEFORE THE HONORABLE HOMER F. WILKINSON, JUDGE

Salt Lake City, Utah

Friday, May 18, 1990

APPEARANCES

For the Plaintiff: ANTHONY M. THURBER
Attorney at Law
8 East Broadway, #735
Salt Lake City, Utah 84111
For the Defendant: ARTHUR H. NIELSEN
Attorney at Law
36 South State St., #1100
Salt Lake City, Utah 84111

REPORTER: SUZANNE WARNICK, CSR, RPR-CM
Official Court Reporter
240 East 400 South, #534
Salt Lake City, Utah 84111
801-535-5479

0017

1 FRIDAY, MAY 18, 1990; A.M. SESSION

2 J U D G E ' S B E N C H R U L I N G

3
4 THE COURT: Counsel, I do want to give you my
5 decision at this time.

6 Let me indicate to you that I spent
7 considerable time going over your memorandums and
8 affidavits, the applicable law. I guess the only thing
9 I haven't seen is the Form A of which has been referred
10 to here today and which substantiates the position that
11 the Court has while the Court was looking at this.

12 First of all, let me indicate to you that I
13 do think the affidavit of Mr. Florence, as Mr. Nielsen
14 has pointed out, is flawed with certain material and
15 statements which would not be admissible in a court of
16 law. However, there are statements in there that would
17 be admissible.

18 But assuming and accepting all of the
19 affidavit, and assuming Mr. Thurber's position, this is
20 a broker situation. And I think his statement of the
21 law is absolutely correct as far as a broker's
22 commission is concerned as far as producing an able and
23 willing buyer.

24 I first looked at the letter of May 31st and
25 the release of the same date. And if the Court accepts

1 those -- of course I am bound to accept them -- but if I
2 say they are the final documents, then by their terms,
3 they state that the money is not due until the
4 transaction or unless the transaction closes. The
5 release would come into effect immediately upon the
6 letter becoming effective. I don't think the release is
7 effective until the letter -- there is no release --
8 there is nothing to be released until the letter becomes
9 effective really.

10 And of course that is the law of brokerage,
11 as Mr. Thurber points out in his brief, that the
12 commission is due to a broker when he produces that
13 willing and able buyer unless there are terms contained
14 within the agreement that makes it otherwise. But I
15 certainly think that there are terms contained within
16 the letter of May 31st. So as I say, assuming there was
17 a brokerage situation, that that would prevent the
18 commission from being paid.

19 I don't think -- I am not persuaded that the
20 approval of Mr. Henroid has any bearing whatsoever as
21 far as the situation is concerned. It's been pointed
22 out here today, and I assume that in reading this
23 yesterday, that when it refers to a divorce situation,
24 that it had something to do with the payment of money as
25 far as the divorce and the parties were concerned. So I

1 don't think that has any bearing on it.

2 Now, again assuming that this is a brokerage
3 situation, I go back to the letter of April 22nd and to
4 Form A of which has been referred here today. And on
5 page 26, Section 15, the commission and finder's fee --
6 and of course I called Mr. Thurber yesterday and I
7 believe he was in touch with Mr. Nielsen as to the
8 wording of this paragraph 6 -- that the Court did feel
9 this was a critical situation. That the wording was
10 given to me, and of course as I was able to read it
11 myself, which I could not make it all out.

12 I am not persuaded that either the wording in
13 paragraph 6 or the wording in the Form A is sufficient
14 of a brokerage agreement to satisfy that a commission
15 would be paid upon the broker finding a willing and able
16 buyer. I don't think it's sufficient writing to meet
17 that requirement and must be in writing under the
18 Statute of Frauds. That it does not spell out anything
19 really as far as the terms.

20 And I know Mr. Thurber argues in his brief
21 that every particular term doesn't need to be spelled
22 out. And I think that is correct also as far as the
23 agreement is concerned. But this one just does not even
24 get to the heart of it as far as indicating what is
25 going to be done as far as the payment of a finder's, a

1 brokerage fee. So assuming that everything that
2 Mr. Thurber says in his argument as far as the affidavit
3 and as far as this being a brokerage transaction, I
4 don't think the letter of April 22nd or anything in Form
5 A says the requirement of the law of the Statute of
6 Frauds or the requirement as far as what must be in
7 writing for a brokerage.

8 Now, I am of the opinion and I so find that
9 I don't think that this is a brokerage situation.
10 There is not the sale of real property here. Real
11 property is being traded or paid for the stock, but this
12 is not the sale of real property. Therefore, I don't
13 think that law applies at the outset.

14 I am of the opinion that the wording in the
15 April 22nd letter and the Form A is not sufficient to
16 spell out that anything was going to be paid regardless
17 of what took place. I think the parties came down to
18 it, that they did then negotiate, and there may have
19 been some misunderstanding as far as what was supposed
20 to be paid by Mr. Florence. They reduced that to
21 writing as far as the letters of May 31st, the letter of
22 release of May 31st, I think that's the date, May 31st,
23 1984.

24 MR. NIELSEN: Yes, sir.

25 THE COURT: And in those matters they did

1 spell out that a commission was going to be paid upon
2 the closing of the transaction, which never closed. I
3 don't think it's material to this Court in this case as
4 to why this transaction did or did not occur. That may
5 be a cause of action in another action with other
6 parties, some of these parties. But I don't think it is
7 material as far as this particular case is concerned. I
8 don't think the questions of fact -- and I think there
9 are questions of fact as far as what took place or what
10 did not take place at the time of closing, and what was
11 said and what was not said and why it didn't close --
12 there are disputes, but I don't think they are material
13 as far as this particular case is concerned.

14 So based on that, the Court does feel that
15 the motion of the defendant is well taken and would
16 grant the Motion for Summary Judgment.

17 Mr. Nielsen, would you prepare the pleadings.

18 MR. NIELSEN: May I prepare an order and
19 judgment, your Honor, on the motion.

20 THE COURT: Yes.

21 MR. THURBER: Thank you.

22 THE COURT: If there are no further questions,
23 court will be in recess.

24 (This concludes this ruling at 10:15 a.m.)

25 * * *

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C E R T I F I C A T E

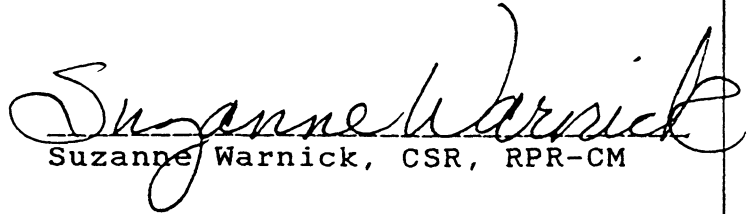
STATE OF UTAH)
 :
COUNTY OF SALT LAKE)

I, SUZANNE WARNICK, CSR, RPR-CM, do certify
that I am a Certified Shorthand Reporter, Registered
Professional Reporter with the Certificate of Merit, and
Notary Public in and for the State of Utah.

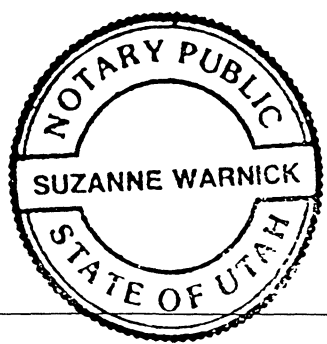
That at the time and place of the proceedings
in the foregoing matter, I appeared as the court
reporter in the Third Judicial District Court, for the
Honorable Judge Homer F. Wilkinson, and thereat reported
in stenotype all of the proceedings had therein;

That thereafter, my said shorthand notes of
the Judge's Bench Ruling on the Motion for Summary
Judgment were transcribed by computer into the foregoing
pages; and that this constitutes a full, true and
correct transcript of the same.

WITNESS MY HAND and official seal at Salt Lake
City, Utah, this 30th day of May, 1990.


Suzanne Warnick, CSR, RPR-CM

My commission expires:
1 April 1991.



ADDENDUM F

61-2-2. Definitions.

As used in this chapter:

(1) "Associate real estate broker" and "associate broker" means any person employed or engaged as an independent contractor by or on behalf of a licensed principal real estate broker to perform any act set out in Subsection (7) for valuable consideration, who has qualified under the provisions of this chapter as a principal real estate broker.

(2) "Commission" means the Real Estate Commission established under this chapter.

(3) "Concurrence" means the entities given a concurring role must jointly agree for action to be taken.

(4) "Director" means the director of the Division of Real Estate.

(5) "Division" means the Division of Real Estate.

(6) "Executive director" means the director of the Department of Commerce

(7) "Principal real estate broker" and "principal broker" means:

(a) any person who for another and for valuable consideration, or who with the intention or in the expectation or upon the promise of receiving or collecting valuable consideration, sells, exchanges, purchases, rents, or leases or negotiates the sale, exchange, purchase, rental, or leasing of, or offers or attempts or agrees to negotiate the sale, exchange, purchase, rental, or leasing of, or lists or offers or attempts or agrees to list, or auctions, or offers or attempts or agrees to collect rental for the use of real estate or who advertises, who buys or offers to buy, sells or offers to sell, or otherwise deals in options on real estate or the improvements thereon or who collects or offers or attempts or agrees to collect rental for the use of real estate or who advertises or holds himself, itself, or themselves out as engaged in the business of selling, exchanging, purchasing, renting, or leasing real estate, or assists or directs in the procuring of prospects or the negotiation or closing of any transaction which does or is calculated to result in the sale, exchange, leasing, or renting of any real estate; and

(b) any person, employed by or on behalf of the owner or owners of lots or other parcels of real estate at a stated salary or upon a commission or upon a salary and commission basis or otherwise to sell such real estate or any parts thereof in lots or other parcels and who sells, exchanges, or offers or attempts or agrees to negotiate the sale or exchange of any such lot or parcel of real estate.

(8) "Real estate" includes leaseholds and business opportunities involving real property.

(9) "Real estate sales agent" and "sales agent" means any person employed or engaged as an independent contractor by or on behalf of a licensed principal real estate broker to perform any act set out in Subsection (7) for valuable consideration.

History: L. 1921, ch. 110, § 2; 1925, ch. 79, § 1; 1929, ch. 77, § 1; R.S. 1933, 82-2-2, L. 1939, ch. 106, § 1; C. 1943, 82-2-2; L. 1963, ch. 146, § 1; 1983, ch. 257, § 2; 1985, ch. 162, § 2, 1987, ch. 73, § 32; 1989, ch. 225, § 87.

Amendment Notes. — The 1985 amendment substituted "any person" for "all persons" at the beginning of Subsection (1)(a), inserted "associate" in two places in Subsection (2), inserted "as an independent contractor" and "principal" in Subsection (2), substituted "sales agent" for "salesman" in two places in Subsection (3), inserted "as an independent contractor" in Subsection (3), added "involving real property" in Subsection (4), substituted Sub

section (5) for former Subsection (5) which read, "'Business opportunity' means an existing business, a business and its good will, a business franchise, or any combination of them", and added Subsections (6) through (9)

The 1987 amendment alphabetized the definitions and renumbered the subsections accordingly, added the present Subsection (8), and made minor changes in phraseology and punctuation throughout the section

The 1989 amendment, effective March 14, 1989, substituted "Department of Commerce" for "Department of Business Regulation" in Subsection (6)

61-2-18. Actions for recovery of compensation restricted.

(1) No person may bring or maintain an action in any court of this state for the recovery of a commission, fee, or compensation for any act done or service rendered which is prohibited under this chapter to other than licensed principal brokers, unless the person was duly licensed as a principal broker at the time of the doing of the act or rendering the service.

(2) No sales agent or associate broker may sue in his own name for the recovery of a fee, commission, or compensation for services as a sales agent or associate broker unless the action is against the principal broker with whom he is or was licensed. Any action for the recovery of a fee, commission, or other compensation may only be instituted and brought by the principal broker with whom the sales agent or associate broker is affiliated.

History: C. 1943, 82-2-18, enacted by L. 1951, ch. 102, § 2; 1983, ch. 257, § 17; 1985, ch. 162, § 16.

Amendment Notes. — The 1985 amendment substituted references to principal brokers, sales agents, and associate brokers for the recovery of a fee, commission, or other compensation may only be for “such action shall

references to principal real estate brokers, real estate salesmen, and brokers, respectively; deleted “the doing or rendering of” after “rendered” in Subsection (1); added “with whom he is or was licensed” at the end of the first sentence of Subsection (2); substituted “action for be” in the second sentence of Subsection (2); and made minor changes in phraseology.

Rule 56. Summary judgment.

(a) **For claimant.** A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) **For defending party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) **Motion and proceedings thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **Case not fully adjudicated on motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of affidavits; further testimony; defense required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) **When affidavits are unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits made in bad faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

ADDENDUM G

MUTUAL RELEASES BY AND BETWEEN GILES FLORENCE,
DAVID B. JOHNSON, SECURITY INTERNATIONAL CORPORATION,
SECURITY INTERNATIONAL INSURANCE COMPANY,
AND NORTHWEST SALES COMPANY

This Mutual Release is made and entered into as of this 19th day of July, 1984, by and between GILES FLORENCE, DAVID B. JOHNSON, SECURITY INTERNATIONAL CORPORATION, SECURITY INTERNATIONAL INSURANCE COMPANY, and NORTHWEST SALES COMPANY.

WHEREAS Giles Florence has provided certain personal services to David B. Johnson, Security International Corporation, Security International Insurance Company, and Northwest Sales Company, and

WHEREAS Giles Florence has been paid for those personal services at least the amount of Twenty-five Thousand Six Hundred Twelve and 3/100 (\$25,612.98) DOLLARS, and such additional sums as may appear in the books and records of either Security International Corporation and/or Security International Insurance Company, between the dates of February 1, 1983 and July 19, 1984, and *and Northwest Sales Company*

WHEREAS each of the parties to this Release have agreed to settle upon all matters and also upon all personal service contracts, written or oral, entered into between the parties at any time, up to and including the date of this release agreement, and by the execution of Mutual Releases in the manner hereinafter appearing:

NOW THIS INDENTURE WITNESSETH: That pursuant to the said agreement recited and set forth herein and in consideration of the payment of the sum of at least \$25,612.98, plus such additional sums as may appear upon the books and records of either Security International Corporation and/or Security International Insurance Company, the receipt and sufficiency of which is hereby acknowledged by Giles Florence, each of the parties to this agreement hereby release the other, their heirs, personal representatives, estates and assigns from all sums of money, accounts, actions, claims and demands up to the date and execution of these presents.

Each of the undersigned hereby declare that no promise or inducement has been made or offered for this mutual exchange of releases except as set forth herein; that this mutual exchange of releases is executed without reliance upon any statement or representation by or in behalf of the person or parties released, or their representatives; that this release is intended as a discharge of the releasee(s) from any and all further liability to each of the other undersigned parties for the consequences of said events, including all said loss and damage, both known and unknown, direct and consequential; that no mistake of fact with respect to the nature or extent of said consequences, or of said loss or damage, shall invalidate or void this Release; and that said consideration is voluntarily accepted for the purpose of making a full, complete and final

EXHIBIT

H. B. Johnson

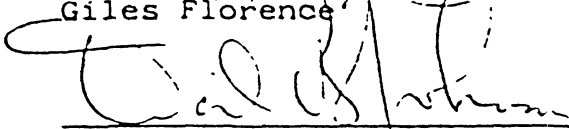
compromise, adjustment and settlement of any and all said claims, demands or causes of action, disputed or otherwise.

IN WITNESS WHEREOF, each of the parties have hereunto set their hands and seals this 19th day of July, 1984.

- C A U T I O N -

READ BEFORE SIGNING


Giles Florence


David B. Johnson

SECURITY INTERNATIONAL CORPORATION

By 

David B. Johnson, President

SECURITY INTERNATIONAL INSURANCE COMPANY

By 

David B. Johnson, President

NORTHWEST SALES COMPANY

By 

David B. Johnson, President