

1958

# Security Title Co. v. Eugenia R. Hunt et al : Brief of Appellant

Utah Supreme Court

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W. R. Huntsman; Attorney for Appellant;

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# IN THE SUPREME COURT OF THE STATE OF UTAH

SECURITY TITLE COMPANY,  
a corporation,

*Plaintiff,*

— vs. —

EUGENIA R. HUNT, FRED T.  
AOKI, and KYIOKO AOKI, his  
wife; NOBURO AOKI and EVA  
T. AOKI, his wife, and the ALTA  
REALTY AND CONSTRUCTION  
COMPANY,

*Defendants.*

8952

Case

~~No. 8524~~

## BRIEF OF APPELLANT

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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## BRIEF OF APPELLANT

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### STATEMENT OF CASE

This is an appeal by Eugenia R. Hunt from a judgment ~~from a judgment~~ in favor of the Aokis granting specific performance of a real estate contract.

This case arises from a suit instituted by the plaintiff, who alleges it is the holder of certain monies and documents as a result of an escrow agreement. That the

escrow is ready for completion, but Eugenia R. Hunt has served notice of rescission on the grounds of fraud and that the other defendants are demanding performance, and being in the position of mere stakeholder, it tenders the papers and monies into court for an adjudication.

To these averments the defendant and appellant, Eugenia R. Hunt cross complains, that at the time of her signing the exchange agreement (Ex. 1 P) she was grossly mislead by one Florence O. Young, a real estate agent in the employ of Ray Hemingway, doing business under the trade name of Alta Realty and Construction Company. Mrs. Hunt was the owner of an apartment building located at 453 East 8th South Street in Salt Lake City, Utah, and the Aokis were the owners of a dwelling house located at 1027 East 2nd South Street in Salt Lake City, Utah.

The case was tried without a jury over the protest of appellant (Tr. 90), and appellant assigns the failure of the pre-trial judge to permit the demand for a jury, though the jury fee had been paid, and the denial of the trial court of appellant's redemand for a trial by jury (Tr. 90) as one of the errors committed by the court prejudicial to the appellant's interest and contrary to law.

The appellant claims the fraud perpetrated by Hemingway and Young was a continuing fraud from the beginning to the final act.

Ray Hemingway and the Alta Realty and Construction Company are one and the same, the latter being but

a trade name used by Hemingway in the operation of his business. Mr. Haliday, the office manager of the Sugar House Branch of the office of the plaintiff, testified: (Tr. 93)

Q. Who is the Alta Realty with respect to this transaction?

A. Well, Mr. Hemingway is the broker and Mrs. Florence Young is the saleslady involved in the transaction.

The appellant relies upon the following points for a reversal of the judgment appealed from.

## STATEMENT OF POINTS

### POINT 1

THE PRETRIAL JUDGE ERRED IN REMOVING THE CASE FROM THE JURY CALENDAR, THOUGH THE FEE HAD BEEN PAID, AND THE TRIAL COURT ERRED IN ITS DENIAL OF A JURY MADE IN OPEN COURT BEFORE TRIAL.

### POINT 2

THE COURT ERRED IN FINDING THAT THE ALTA REALTY AND CONSTRUCTION COMPANY (RAY HEMINGWAY), ONE OF THE AGENTS FOR THE PARTIES, COULD RECOVER IN THIS ACTION ON A NOTE REPRESENTING A PART OF THE REALTY COMMISSION.

### POINT 3

THE COURT ERRED IN FINDING THAT THE APPELLANT OWED ONE HUNDRED (\$100.00) DOLLARS PER MONTH RENTAL TO THE AOKIS

FOR THE USE OF THE APARTMENT OCCUPIED BY HER, IN ADDITION TO THE RENTALS OF THE OTHER APARTMENTS.

#### POINT 4

THE COURT ERRED IN ITS FAILURE TO FIND THAT RAY HEMINGWAY AND FLORENCE O. YOUNG, AGENTS OF ALL OF THE PARTIES HERE CONCERNED, COMMITTED AND PRACTICED A CONTINUING FRAUD UPON THE APPELLANT.

#### ARGUMENT

##### POINT 1

THE PRETRIAL JUDGE ERRED IN REMOVING THE CASE FROM THE JURY CALENDAR, THOUGH THE FEE HAD BEEN PAID, AND THE TRIAL COURT ERRED IN ITS DENIAL OF A JURY MADE IN OPEN COURT BEFORE TRIAL.

The pretrial judge ordered the case tried without a jury and ordered the five (\$5.00) dollar fee returned to the appellant on its own motion, and the written order of the court (see record file page 50) for the return of the fee and the redemand for a jury made in open court the day of trial, and the denial of the same by the trial judge (Tr. 90), is reversible error.

The appellant alleges that fraud and misrepresentation had been practiced upon her by Hemingway and Young, appellant's agents, who were also the agents of the Aokis, the other parties to the agreements, but Hem-

ingway does not come into the picture as the owner of the Alta Realty Company until the trial, and up to that time, under such circumstances, the later furnishing of a contract of sale for the Aoki's property on which Ray Hemingway was one of the purchasers, the question of the agency of Hemingway in relation to the appellant as well as the Aokis, was one of fact, and as such was triable by a jury. The pretrial order shows a waiver by appellant, but such is not the case as evidenced by the order of the pretrial court for the return of the fee paid (see record, p. 50), and the redemand made before Trial (Tr. 90), and the further statement of the court in its pretrial order,

“There will be an issue of fact as to whether Florence O. Young was the joint agent of the defendant Eugenia R. Hunt and the other defendants.”

If there is any question of fact to be determined in a case which involves equity, the parties are entitled to a jury trial. *Farmer v. Loofbourrow* (Idaho) 267, Pac. 2nd 113. 50 C. J. S., Sec. 23 (Juries), Page 738, says,

“That the parties to a law action are generally entitled to a jury trial as to the issues of fact, it is clear that the right to a jury trial frequently turns on whether or not the action is one properly cognizable in equity, and this question is determined by the real nature of the action as shown by the pleadings of all the parties considered in their entirety, considering the relief sought. The showing of equity jurisdiction must be real and substantial, where the question is doubtful, the court will generally decide in favor of the right to a jury trial.”



The right to a trial by jury when fraud and deceit are alleged seems to be the general rule. 50 C. J. S., Sec. 16, page 731. The general rule in Utah is set out in *Goddard v. Lexington Motor Company*, 63 Utah 161, 223 Pac. 340, page 342.

“When evidence is adduced to prove the existence of a disputed agency, its existence or non-existence; aided by proper instructions of the court, even though the evidence is not full and satisfactory, and in such cases it is error for the court to take the question from the jury by directing a verdict by instruction or non-suit.”

## POINT 2

THE COURT ERRED IN FINDING THAT THE ALTA REALTY AND CONSTRUCTION COMPANY (RAY HEMINGWAY), ONE OF THE AGENTS FOR THE PARTIES, COULD RECOVER IN THIS ACTION ON A NOTE REPRESENTING A PART OF THE REALTY COMMISSION.

The note in question was executed by appellant for \$975.00, the balance of the 5% commission on the \$39,500 transaction, and was payable to the Alta Realty and Construction Company, who at no time, was a party to this suit which is one requesting specific performance in a real estate deal made by Hemingway and Young between the Aokis and this appellant.

In the answer and counterclaim to the cross complaint of appellant, the Alta Realty and Construction Company asked the court, third cause of action of the

counterclaim, page 21 of the file record, for a judgment on the note. The appellant filed her motion to strike said allegation (page 25 of the record file) and the matter was duly heard before the Honorable Martin M. Larson, one of the judges of the court, and the motion was granted, and the same was stricken from the answer and counterclaim. (See page 30 file record.) After that procedure, what did the court have left in the pleadings to incorporate the payment of the note in its findings.

### POINT 3

THE COURT ERRED IN FINDING THAT THE APPELLANT OWED ONE HUNDRED (\$100.00) DOLLARS PER MONTH RENTAL TO THE AOKIS FOR THE USE OF THE APARTMENT OCCUPIED BY HER, IN ADDITION TO THE RENTALS OF THE OTHER APARTMENTS.

In discussing this point, I challenge anyone to show one scintilla of evidence in the record concerning the rental value of the apartment occupied by the appellant. The sum recited by the court in its findings is entirely erroneous and is reversible error.

### POINT 4

THE COURT ERRED IN ITS FAILURE TO FIND THAT RAY HEMINGWAY AND FLORENCE O. YOUNG, AGENTS OF ALL OF THE PARTIES HERE CONCERNED, COMMITTED AND PRACTICED A CONTINUING FRAUD UPON THE APPELLANT.

There isn't any question of Hemingway and Young being the agents for both the appellant and the Aokis.

Mrs. Young testified (Tr. 169) as follows:

Q. Now in your transactions, Mrs. Young, with the Aokis, you had an exchange agreement signed by Fred T. Aoki?

A. Yes.

Q. And you had an understanding with Mr. Noburo Aoki that you would also represent him. Is that correct?

A. Yes.

It follows that if through the conduct of a common agent, one of two principals has been defrauded, the other principal cannot acquire any advantage growing out of the fraud. *Boston Five Cents Saving Bank v. Brooks*, 309 Mass. 52, 34 N. E. 2d 435. Courts will not and ought not to be made the agencies whereby fraud is in any respect, recognized or aided.

The doctrine of "clean hands" should apply in this case. The Aokis are seeking specific performance of a contract based upon an instrument (Ex. 4 P) purposely prepared to mislead and misguide the appellant. They could not be parties to a purchase contract executed by their own agent as purchaser without well knowing the scheme and purpose thereof. The instrument shows that Hemingway was also a witness to the Aoki's signatures.

On the doctrine of "clean hands" the Utah case of *Swanson v. Sims*, 51 Utah 485, Quote 496. 170 Pac. 774 quote 777 has this to say:

"Plaintiff is seeking the aid of the court of equity to enforce a contract, which, under the admissions

contained in the pleadings, as well as the findings of the jury, he procured by fraud and deceit. A court of equity is a court of conscience, and anyone appealing to, or asking the aid of such courts should come in with "clean hands."

The fraud here was founded in the beginning when Florence Young secured the signature of the appellant upon the exchange agreement (Ex. 1 P) the description on the agreement is written with a typewriter while all the other "fill-ins" are made in the handwriting of Florence Young. Here is the reason. Florence Young knew, from her attempt in 1956, to trade the Aoki's property at 1027 East Second South Street in Salt Lake City, Utah, that if Mrs. Hunt, the appellant, knew the above property was involved, she would not make a deal as shown by the testimony of Mrs. Hunt. (Tr. 187)

Q. Well were you shown any property in 1956 by Florence Young in connection with the sale of your apartment at that time?

Y. Yes.

Q. And among the properties that you were shown, were you shown a property at 1027 East Second South?

A. Yes.

Q. Now did you, at that time, visit the property at the request of Mrs. Young?

A. I went with Mrs. Young, I think.

Q. And were you shown the house and went through it thoroughly?

A. Yes.

Q. And what was your reaction to taking the house as a part down payment on your apartment at that time?

A. That house was decidedly repulsive to me (Tr. 187).

Q. (Tr. 201) Had you understood and known this property at 1027 East Second South was involved, would you have signed that real estate contract?

A. Absolutely not, and they knew it.

The appellant further testified that the typewritten description of the property was not on the exchange agreement at the time she signed it (Tr. 189)

Q. You will notice there is some typewriting on it. Was that typewriting on this when you signed it?

A. No.

Q. Was there any other signature of any kind on there when you signed it?

A. I don't think there was, No.

Q. Now what did Mrs. Young represent to you when you did sign it?

A. She came in with a story she had the best contract or some bargain that I had ever been offered and she fluttered around there . . . Then she settled back and she said, "Well Mrs. Hunt would you consider a real estate contract," and I had no idea that the real estate contract she had in view was the contract based on the property I had repeatedly rejected. (Tr. 189)

I call the court's attention again to Exhibit 1 P, which is dated August 19th, 1957, and to Exhibit 4 P, a Uniform

Real Estate Contract dated August 27th, 1957. Does the court now see the clever scheme these arch conspirators were concocting? When Hemingway and Young found out that Mrs. Hunt could be interested in a good real estate contract, together with some cash, as a down payment on her property, (Tr. 189) they conveniently, eight days later, made a contract of sale for the Aoki's property in which one of Aoki's agents, Ray Hemingway, financially irresponsible, became one of the principal purchasers as well as a witness to the signatures of the Aokis, the other purchaser being a so-called Wanda Nelson of Phoenix, Arizona, and to further mislead and fool the appellant, these clever operators raised the price of the sale figure of the Hunt apartment \$1,500 and offset this by showing a \$1,000 down payment from the purchasers, leaving a balance due thereon of \$9,500, which is exactly \$1,500 over and above the price of the Aoki property as offered Mrs. Hunt in 1956. In other words, the Aokis would be obtaining the property of Mrs. Hunt for the very same deal she had turned down in 1956.

The Aokis knew that the real purchaser of their property was Ray Hemingway, the owner of the firm name Alta Realty and Construction Company, and they further knew that they had to know the entire scheme in order to complete the deal. Imagine, if you can, Ray Hemingway, a clever realtor, legitimately agreeing to pay \$10,500 for a property that a few months before, he had, through his sales representative, offered as a down payment on the same property for \$8,000. The Aokis knew that their

attempt to buy the property of Mrs. Hunt in 1956 for a down payment of \$8,000, represented by their home, was a positive failure, so they had to be parties to the scheme to raise the purchase contract on their home \$2,500 in order to entice Mrs. Hunt to sell her property, and to do this, these schemers raised the purchase price of the apartment \$1,500 so Mrs. Hunt would think she was getting \$1,500 more than she was asking on the listing, and this supposed profit would more than take care of the balance of the commission, for these schemers knew Mrs. Hunt had said that she could not pay any commission on a \$38,000 deal.

On this point Mrs. Hunt testified: (Tr. 199)

Q. Now there was something in the exchange agreement that provided for a commission to the agent. Did you say anything to the agent about this?

A Yes I did.

Q. What did you tell her?

A. I don't see how in the world I am going to pay a commission out of this. "Oh!" she says, "That won't matter. We'll fix that up somehow." (Tr. 199)

And they most certainly did fix it up when they came up with that contract for the purchase of the Aoki home, and they all knew that when the deal was closed, Ray Hemingway, the user of the trade name Alta Realty and Construction Company, would get his commission, the Aokis would get the appellant's apartment, Hemingway

would default the contract and everybody would be contented except the appellant, who would be left holding the bag.

Will this court approve the operation of a real estate transaction such as this? I sincerely do not believe so.

Respectfully submitted,

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