

1959

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

Utah Supreme Court

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JAN 21 1959

Clerk, Supreme Court, Utah

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.

Case

No. 8953

BRIEF OF RESPONDENTS

WILLIAM C. QUIGLEY

Attorney for Respondent

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BRIEF OF RESPONDENTS

Statement of Case

Appellant is appealing from an Interpleader Action, Wherein a judgment was entered by the trial court, in favor of all defendants other than defendant, Eugenia R. Hunt, granting specific performance of a Uniform Real Estate contract, and the execution of an escrow in connection therewith.

Appellant was the owner of a fourplex located at 453 East 8th South, Salt Lake City, Utah, and on the 1st day of June, 1957, listed said property for sale with Alta Realty and Construction Co., through one of their agents, Florence O. Young, a licensed real estate sales-lady. The listing was made on a sales agency contract for apartment listings (Exhibit 13 "D") a form approved by the Utah State Securities Commission for use by the Salt Lake Real Estate Board and Multiple Listing Bureau, of which Alta Realty and Construction Company is a member. Said listing offered said property for sale at a purchase price of \$38,000.00, and also provided that appellant would consider as downpayment a small home with an apartment or a small duplex.

Alta Realty and Construction Company found a buyer ready, willing and able to pay the purchase price, provided the appellant would take as a down payment a converted duplex located at 1027 East 2nd South Street in Salt Lake City, Utah, as per the listing agreement, the same being owned by Fred T. Aoki and Kiyoko June Aoki, his wife, respondents herein. Said property was burdened by a mortgage of \$2,000.00 at that time. Appellant objected to the property having a mortgage on it, so respondents paid it off. See the uncontroverted testimony of Florence O. Young, Agent of Alta Realty, (TR 76) while being cross examined as a hostile witness.

- A. "Mrs. Hunt would not take the deal unless that property was cleared. It had a \$2,000.00 mortgage on it and the Aoki's cleared that off."

And again (TR 84).

Q. "Mrs. Young, you stated under questioning that Mrs. Hunt would not accept the property because it wasn't clear."

A. "That is right."

Q. "And in order to make it clear you stated the Aoki's went down and paid it off."

A. "Uh, huh, it was a \$2,000.00 mortgage."

Appellant had also objected to the property being vacant and didn't want to be bothered trying to keep it rented. It had been suggested to appellant that the property be sold on contract and appellant hold the contract, or resell it for cash. Appellant was agreeable to the suggestion, and required that the property be sold and she to be furnished the contract. See the uncontroverted testimony of Florence O. Young, agent of Alta Realty, relating to the duplex being sold on contract, while being cross-examined as a hostile witness (TR 85).

Q. "It was sold on contract?"

A. "Yes."

Q. "At whose request was it sold?"

A. "Mrs. Hunts."

Q. "Now, would you state why Mrs. Hunt wanted that sold?"

A. "Because she wanted the property cleared."

Q. "Would you state again why Mrs. Hunt wanted you to have the property sold before it would be acceptable to her as a trade?"

A. "She would accept a real estate contract, but not the property."

Said duplex property was sold for \$10,500.00 with \$1,000.00 down, to a Wanda Nelson, on a Uniform Real Estate Contract (Exhibit 4).

Now that the mortgage of \$2,000.00 had been paid and the property sold on contract, the requirements of appellant had been met, and an Exchange Agreement (Exhibit 1 P) was prepared. An Exchange Agreement is also a form approved by the Utah State Securities Commission for use of the Salt Lake Real Estate Board, and Multiple Listings Bureau, and is a preliminary contract to the final contract of sale where exchanges of property are made, just the same as an Earnest Money Agreement is a preliminary contract to the final contract of sale when any home is bought or sold. Knowing that should appellant wish to convert her contract on the Second South property to cash, it would be necessary that it be discounted, and to give added protection to appellant, Alta Realty required the Aokis' to purchase appellant's property for \$39,500.00. This would allow appellant to sell the \$10,500.00 contract, (having an unpaid balance of \$9,500 .00) for \$8,000.00 cash, and still not realize less than \$38,000.00, the sum for which said property was listed. The exchange agreement was executed by the appellants and respondents, and under the authority therein, Alta Realty delivered same to the Security Title Company, together with the abstracts on both properties, with a request that the abstracts be brought to date and the final papers prepared and the transaction be closed. See the testimony of Herbert H. Halliday, Attorney at Law and manager of the Security Title Company, Sugarhouse Branch (TR 4 & 5).

Q. "Would you state to the Court when you first became acquainted with the parties respecting this transaction."

A. "Well, it was during the month of August. Alta Realty Company brought me in an Exchange Agreement and an Earnest Money Agreement and requested that we continue the abstracts on both pieces of property concerned and prepare the closing papers."

See the further testimony of Herbert H. Halliday (TR 6).

A. "Well, upon receipt of these, of the Exchange Agreement and the Earnest Money Agreement, we obtained abstracts on both pieces of property and they were continued to date. Then contracts were prepared and individual buyers and sellers escrow statements were prepared based upon the facts contained in the Exchange Agreement and the Earnest Money in preparation for closing the transactions between the parties."

WANT

NOT KEEP

After the necessary documents were prepared and abstracting completed, a closing date was set for on or ~~→ appointment, and sought counsel that same day, and em-~~ *After 1/1/12*
~~appointment, and sought counsel that same day, and em-~~
appointment, and sought counsel that same day, and employed one, Dean Sheffield, Attorney at Law, as counsel. The respondents herein then sought and employed present respondent counsel.

Appellant counsel, Dean Sheffield and present respondent counsel met to discuss and clarify any problems connected with this transaction. Mr. Sheffield raised three objections.

1. He had not had time to check the credit of Wanda Nelson, Contract buyer of the duplex.

2. He had not met or been able to talk to Wanda Nelson.

3. The exchange agreement was signed by Fred Aoki and his wife, and the Real Estate contract was running to Nobuo Aoki and his wife.

To satisfy objection No. 1, it was agreed that Ray Hemmingway, President and owner of Alta Realty and Construction Company would guarantee payment on said contract, and his signature appears as an obligor thereon in evidence of same.

To satisfy objection No. 2, respondent counsel furnished Mr. Sheffield the telephone number of said Wanda Nelson, and Mr. Sheffield called and talked to her. See the testimony of Appellant concerning these objections (TR 118).

Q. "Well, did your counsel tell you that I gave him the telephone number of Wanda Nelson in Arizona?"

A. "No."

Q. "And that he called personally and talked to her,"

A. "He said he had talked to her, yes."

To satisfy objection No. 3, Fred Aoki, Nobuo Aoki and their wives all signed the contract, obligating them all to pay according to the terms therein. See the testimony of appellant (TR 120).

Q. "Well, did your counsel Dean Sheffield tell you that I had assured him that all names of the four Aokis' would appear on the contract if it was of concern to you rather than just two?"

A. "I think he told me that on the phone."

Security Title was notified of the arrangements made by counsel of appellant and respondent counsel, and a date was set for closing the transaction on or about the 1st day of October, 1957.

On said day set for closing the transaction, appellant appeared with counsel at the office of the Security Title Company, Sugarhouse Branch, and examined the documents. Said papers were not signed at that time inasmuch as the original date for closing was September 1st, 1957, and all pro-rata figures were adjusted to that date. A request was made to change the pro-rata date to November 1st, inasmuch as it was already October. This request was made to respondent's counsel and was accepted and agreed. See the testimony of Herbert H. Halliday, Attorney at Law and Manager of Security Title Company, Sugarhouse Branch (TR 8).

Q. "Now, you stated that Mrs. Hunt came to your office. Did you have any discussions with her respecting the buyers or sellers statement?"

A. "Yes we did."

Q. "Would you state what the nature of that discussion was and when it took place?"

A. "To the best of my knowledge she came to my office with her attorney, Dean Sheffield

It was either the last part of September or the very first part of October, 1957. All of the papers which I had prepared were discussed and explained to her by her attorney, Mr. Sheffield. There was, as I recall, one main objection for her not signing the papers at that time and that was because my papers were — my statements were pro-rated on the basis of the exchange agreement on September 1st and, of course, it was now about the 1st of October, and therefore they felt that the pro-ration should be changed to the 1st of November."

Q. "Was any change made in the pro-ration on the statements as a result of that confliction?"

A. "I did not make any change. I made notations of their request that it be changed and informed them that I would discuss the matter with the buyers, and if it was satisfactory with the buyers, the changes would be made."

Q. "Did you so discuss it with the buyers?"

A. "I personally did not discuss it with the buyers. This happened just a day or two before I was scheduled to go on a vacation, and because of that situation, the file was turned over to Mr. Henegar, who was Escrow Officer at our main office downtown, and he was requested to redraft and redraw the papers to show this new pro-ration date. I discussed it with the buyers, Mr. Quigley, their attorney, and he stated November 1st pro-ration date would be satisfactory. This information I passed on to Mr. Henegar."

The new date for closing the transaction was set for October 10, 1957, at the main office of Security Title Company, and the closing to be handled under the supervision of H. D. Henegar, their Escrow Officer.

On the 10th day of October, 1957, appellant, with her counsel, appeared at the office of Security Title Company, at the appointed time, for the purpose of closing the transaction. All papers and documents were again examined by appellant and her attorney and signed. Appellant also, at that time, paid in certain monies required by the closing papers, which were also examined by appellant and counsel and signed. See the cross examination of H. D. Henegar, Escrow Officer of Security Title Company (TR 30).

Q. "Mr. Henegar, you have just testified that Mrs. Hunt, accompanied by her attorney, came to your office at the appointed time, October 10th to close the transaction?"

A. "That is correct."

Q. "At that time, did Mr. Sheffield again go over with Mrs. Hunt all of the papers and explain them to her?"

A. "He did."

Q. "And she signed the papers after the explanation to her by her counsel?"

A. "She did."

And further (TR 31).

Q. "Now did Mrs. Hunt at the time she was in your office with Mr. Sheffield, after he had explained all documents to her, and after she had placed her signature upon the documents, did she voluntarily pay in the money and the necessary — if there would be anything else necessary to close the transaction?"

A. "She did."

Q. "Was there anything left for Mrs. Hunt to do or counsel for Mrs. Hunt other than examine the abstract of the property they were turning in on the exchange agreement?"

A. "Nothing".

The escrow was complete and ready for execution as soon as the abstract on the duplex was examined by Mr. Sheffield. Mr. Sheffield was given the abstract on October 10, and late in the afternoon of October 16, Mr. Henegar called Mr. Sheffield and was promised he would have it ready the following morning, October 17. The morning of the 17th, Mrs. Hunt appeared at the office of the Security Title Company with new counsel, and threatened suit if the escrow be distributed. Subsequently, Security Title Company placed all documents and monies in court in an interpleader action, being under possible suit from all defendants named in the interpleader action.

All defendants other than defendant, Eugenia R. Hunt, answered and counter-claimed against the plaintiff. Defendant, Eugenia R. Hunt, answered and cross-claimed against all other defendants. All other defendants answered the cross complaint and counterclaimed. Judge Larsen, one of the judges in the lower court, felt that affirmative relief for defendants to the cross-complaint, should be by affirmative allegations for specific performance and not by counter-claim. The case went to pre-trial before the Honorable Joseph G. Jeppson and to trial before the Honorable Merrill C. Faux, and specific performance was granted, and execution of the escrow ordered.

STATEMENT OF POINTS

POINT 1

THE PRE-TRIAL JUDGE DID NOT ERR IN REMOVING THE CASE FROM THE JURY CALANDER, THOUGH THE FEE HAD BEEN PAID, AND THE TRIAL COURT DID NOT ERR IN ITS DENIAL OF A JURY MADE AT THE TRIAL.

POINT 2

THE COURT DID NOT ERR IN FINDING THAT THE ALTA REALTY AND CONSTRUCTION COMPANY COULD RECOVER IN THIS ACTION ON A NOTE REPRESENTING A PART OF THE REALTY COMMISSION.

POINT 3

THE COURT DID NOT ERR IN FINDING THAT THE APPELLANT OWED \$100.00 PER MONTH RENTAL TO THE AOKI'S FOR THE USE OF THE APARTMENT OCCUPIED BY HER, IN ADDITION TO THE RENTALS OF THE OTHER APARTMENTS.

POINT 4

THE COURT DID NOT ERR IN ITS FAILURE TO FIND THAT RAY HEMMINGWAY AND FLORENCE O. YOUNG, AGENTS OF ALL THE PARTIES HERE CONCERNED, COMMITTED AND PRACTICED A CONTINUING FRAUD UPON THE APPELLANT.

ARGUMENT

POINT 1

THE PRE-TRIAL JUDGE DID NOT ERR IN REMOVING THE CASE FROM THE JURY CALANDER, THOUGH THE

FEE HAD BEEN PAID, AND THE TRIAL COURT DID NOT
ERR IN ITS DENIAL OF A JURY MADE AT THE TRIAL.

Refer to the pre-trial order (Record file P. 50).

The Court: "Since the above entitled pre-trial order was dictated, the court had a discussion with counsel and discovered that the case had been set for trial and discovered that a demand for a jury has been filed and paid for by the defendant, Eugenia R Hunt, and in further discussion with counsel, discovered that counsel was willing, for said defendant Hunt, to waive the jury, and have the case tried before a judge without jury. Is that correct Mr. Huntsman?"

Mr. Hunstman: "Yes, that is correct."

The Court: "It is ordered by the Court that the case be set on the 30th day of April at 10:00 o'clock A.M. for trial, without a jury, and that the county clerk refund to Mr. Huntsman the jury fee paid."

The pre-trial was heard and dictated on the 11th day of April, 1958. The trial was heard April 30, 1958, nineteen days later. Appellant willingly waived a jury at said pre-trial, then nineteen days later at the trial, requested one. The trial Court properly followed the pre-trial order, which stated the trial would be without a jury.

The request for a jury at the trial was not timely made, and the refusal of the trial court to entertain a demand for a jury at the trial was entirely proper.

Refer to *Utah State Building and Loan Association v. Perkins*, 53 Utah 474, 173 P. 950, which held, a demand

for a jury at the time the case was called for trial came too late.

POINT 2

THE COURT DID NOT ERR IN FINDING THAT THE ALTA REALTY AND CONSTRUCTION COMPANY COULD RECOVER IN THIS ACTION ON A NOTE REPRESENTING A PART OF THE REALTY COMMISSION.

The Alta Realty Company was the real estate agent in this transaction, and entitled to a 5% real estate commission, as provided under the rules and regulations of the Salt Lake Real Estate Board and Multiple Listing Bureau, and allowed herein by the listing agreement, (Exhibit 13 D) and the exchange agreement, (Exhibit 1 P). The commission allowed in this transaction was \$1,975.00, being 5% of the sales price of \$39,500.00. The commission, as evidence in the escrow, was to be paid \$1,000.00 in cash upon distribution of the escrow, and a note (Exhibit 3), for \$975.00 also to be distributed in the escrow. The note calls for payments of \$50.00 per month.

The note was placed in evidence both at the pre-trial and the trial without objection. Specific performance of the contract and execution of the escrow would allow delivery of the instrument to said Alta Realty and Construction Company.

The trial in this cause was heard April 30, 1958. At its completion, the Honorable Merrill C. Faux took the case under advisement. On the 21st day of May, 1958,

counsel for all parties to the action were notified that the Trial Court was going to decree specific performance, and were required to appear before said trial court at 9:00 A.M. on the 23rd day of May, 1958, for the purpose of suggesting to the Court how the documents and funds in the Court should be distributed. The conference was held, suggestions were made, and the Court determined that since Security Title Company had used November 1, 1957, as its closing date, that all documents and funds be returned to said Security Title Company with instructions that the escrow be adjusted to the date of July 1, 1958, but to still use November 1, 1957, as the closing date, and the documents and funds distributed through the escrow on that basis.

The commission note was adjusted accordingly, the same as all other documents were adjusted. This required that the \$50.00 monthly payment on said note be adjusted through the escrow for payments from the closing date of November 1, 1957, to July 1st, 1958. This procedure is not collecting payments on a note for the real estate commission, as the note itself has never been delivered. It is an adjustment to the instructions of the escrow by the Court, prior to the execution of the escrow.

Appellant named Alta Realty and Construction Company as a defendant in their cross-complaint, and now allege said Company is not a party to the action. The Honorable Martin M. Larsen felt affirmative relief for the defendants in the cross complaint, by way of specific performance of the contract and execution of the escrow was more proper than by way of counterclaim. It follows

however, that specific performance of the contract, and execution of the escrow, would result in delivery of the adjusted note, to them, whether they be a party to the action or not, just the same as the abstractor, the County Recorder and others will receive money by virtue of the escrow being executed, and they are not parties to the action.

POINT 3

THE COURT DID NOT ERR IN FINDING THAT THE APPELLANT OWED \$100.00 PER MONTH RENTAL TO THE AOKI'S FOR THE USE OF THE APARTMENT OCCUPIED BY HER, IN ADDITION TO THE RENTALS OF THE OTHER APARTMENTS.

The contract herein, (Exhibit 2), upon which specific performance has been granted is also a document in the escrow. Like all other documents in the escrow, it too was adjusted to the date of July 1, 1958. Respondents herein were entitled to the rentals from the apartments, less the cost of the utilities, and appellant was entitled to the \$300.00 per month payment towards principal and interest during the same period.

The basis to be used in determining the rental values of the apartments were discussed at the special meeting called by the Honorable Merrill C. Faux on the 23rd day of May, 1958. It was agreed that the basis to be used would be the listing agreement itself. (Exhibit 13 D) Appellant under her own signature in said listing agreement placed the monthly rental value of her own apartment to be \$100.00 per month, and that amount was accepted.

POINT 4

THE COURT DID NOT ERR IN ITS FAILURE TO FIND THAT RAY HEMMINGWAY AND FLORENCE O. YOUNG, AGENTS OF ALL THE PARTIES HERE CONCERNED, COMMITTED AND PRACTICED A CONTINUING FRAUD UPON THE APPELLANT.

Paragraph 4 of the lower Court's findings, states in part, to-wit: "The claim of the Cross Complainant of misrepresentations of the exchange agreement, by defendant Alta Realty and Construction Company, was insufficient," and Paragraph 3 therein reads as follows, to-wit: "That the Uniform Real Estate Contract dated October 10, 1958 (Exhibit 2 P herein), is a good valid and binding contract, and the said listing agreement of June 1, 1957, and the said Exchange Agreement of August 18, 1957, are fully merged therein."

After judgment was entered, appellant made a motion to the lower Court to amend the findings. The motion was argued and denied.

See footnote 46 of Rule 72(a) Utah Code Annotated, 1954.

"Supreme Court has full power to review all questions of law and fact in equity cases and to set aside trial courts judgment if, in opinion of Supreme Court, such judgment is not supported by evidence, but where case was regularly tried, and trial court found on all material issues, its findings will not be disturbed by Supreme Court, unless they are so manifestly erroneous as to demonstrate oversight or mis-

take which materially affect substantial rights of appellant.”

McKay vs. Farr (15-U-261), *Klopenstine vs. Hayes* (20-U-45) *Elliot vs. Whitmore* (23-U-342.)

And further, “in equity cases, unless Supreme Court is convinced that trial Court was clearly wrong in its findings, the judgment must stand.” *Omega Investment Co. vs. Wolley* 72-U-474.

As to a real estate broker being an agent to both buyer and seller, it is not only customary, but almost essential, and the law is well settled on the point. See Am. Jur., Vol. 8, pp. 1012, para. 52. A real estate broker becomes an agent of the seller when he takes a listing to sell a home. When he finds a buyer, and signs him up on an Earnest Money Agreement he then becomes the agent of the buyer so he can present the buyer’s offer back to his first principle, the seller.

In this particular case, the Exchange Agreement, (Exhibit P1), clearly authorizes, in writing, bearing appellant’s signature thereto, the right of Alta Realty to act as agent for both appellant and the other respondents.

Appellant’s argument in Point 4 of Appellant’s brief is typical throughout the case. The starting point is with the assumption there was a fraud, which in fact was never shown, never found, and never existed.

I refer to Page 12 of appellant’s brief, commencing with the last paragraph therein. It is true Alta Realty would be entitled to a real estate commission. It is true

the Aokis' would take possession of the four-plex. However, it is also true that appellant would receive \$300.00 per month on her contract on the four-plex, and it is also true that appellant would receive \$1,000.00 as a down payment, and it is also true that appellant would receive a contract on the 2nd South property which sold for \$10,500.00, and has an unpaid balance of \$9,500.00 with payment of \$80.00 per month thereon at 6% interest. The \$80.00 per month payment is due to appellant from Wanda Nelson, and at the request of appellant's counsel, the payment is personally guaranteed by Ray Hemmingway, owner of Alta Realty and Construction Company.

SUMMARY

The following is respectfully submitted to aid this Honorable Court in reaching its decision:

1. Appellant voluntarily waived a jury at the pre-trial.
2. The trial judge tried the case upon a pre-trial order which stated it would be tried without a jury.
3. The request of appellant for a jury, at the trial was not timely made.
4. That the Alta Realty and Construction Company was named as a defendant in the cross-claim of appellant. That upon execution of the escrow, would be entitled to delivery of the note whether a party to the action or not.
5. That the appellant set the value of her apartment in the four-plex at \$100.00 per month in the listing agreement, and signed her name thereto.

6. That the Court did not find fraud, and upon a motion and hearing to amend the findings, the court reiterated there was no finding of fraud.

7. That appellant was with competent counsel for two months between the signing of the exchange agreement and the final contract.

8. That appellant was with competent counsel each time she appeared at Security Title Company for the purpose of examining and signing the final papers, and was with competent counsel at the time she actually signed her name to the documents and paid the necessary money into the escrow.

9. That at no place in the pleadings, or the trial, did appellant attempt to set out the elements of a fraud, although given every opportunity to do so. The entire accusations are by words of fraud, deceit, misrepresentation, etc., without facts or evidence to substantiate the claim.

10. That respondents named in the action were not even requested to attend the trial or be examined. That appellant's case rests solely upon her own testimony and even that is backed only by accusations without supporting facts or evidence.

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