

1959

George A. Chase, Jr. v. Nicholas G. Morgan, Sr., Charitable Foundation : Reply Brief of Appellant

Utah Supreme Court

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Ben D. Browning; John H. Allen; Attorneys for Appellant;

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AUG 6 1959

IN THE SUPREME COURT
of the

STATE OF UTAH **FILED**

APR 15 1959

GEORGE A. CHASE, JR.,

Appellant,

—vs.—

NICHOLAS G. MORGAN, SR.

CHARITABLE FOUNDATION,

Respondent.

Clerk, Supreme Court, Utah

Case Number

8981

On Appeal from the District Court for
Salt Lake County, Utah

REPLY BRIEF OF APPELLANT

BEN D. BROWNING and

JOHN H. ALLEN

Attorneys for Appellant

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REPLY BRIEF OF APPELLANT

REPLY TO ADDITIONAL STATEMENT
OF FACTS

Respondent's additional statement of facts contains matters which must be set in proper context for the Court to have a clear understanding of the issues of this case.

First, Respondent sets forth an interrogatory to Appellant and the answer thereto, notwithstanding the

Trial Court's specific refusal to receive this evidence. (Tr. 265) Set in proper context, Appellant's testimony taken and harmonized with the Answer to this Interrogatory shows that he was a middleman rendering a personal service, and not a seller of real estate as Respondent contends.

Second, Respondent has set forth a portion of the Pretrial Order (Brief 7), where it is written "The plaintiff will further contend that it had no agreement with defendant . . .," when the true text of the Pretrial Order was a statement in the alternative as follows: "The plaintiff will further contend that *if he* had no agreement with defendant for the payment by defendant to plaintiff and his assignor, that he had an agreement with the Sierra Madre Oil Company . . ." (emphasis added). Let there be no mistake that Appellant does claim an agreement with Respondent which is the same agreement the Trial Court found. (Finding of Fact No. 10)

Third, Respondent has published as a fact that it makes no claim to the last three payments of \$13,826.54 each, totaling \$41,479.62, but that the Escrow Company is holding one payment, and that it has paid two payments to the President of Sierra Madre Oil Company, Donald McDonald. The evidence discloses that Respondent paid over the monies above in part upon the understanding that Sierra Madre Oil Company, Donald

McDonald and their attorney would stand behind the Respondent in resisting Appellant's claim. (Tr. 217, 218)

Respondent, through its President, agreed with Arch MacDonald, who supplied the money for Sierra Madre Oil Company, that none of the funds here involved would be paid to either Sierra Madre or Dr. Donald McDonald, its Geologist President. (Tr. 72, 73)

STATEMENT OF POINTS

POINT I.

THE EVIDENCE SHOWS THAT APPELLANT PERFORMED ONLY THE PERSONAL SERVICES OF A MIDDLE-MAN AND DID NOT PERFORM THE SERVICES OF A BROKER.

POINT II.

THE TRIAL COURT DID NOT ERR IN HOLDING THAT PLAINTIFF IS NOT BARRED FROM RECOVERY BECAUSE OF THE PROVISIONS OF UTAH CODE ANNOTATED, 1953, 25-5-1 AND 25-5-4, SUBDIVISION 5.

ARGUMENT

POINT I.

THE EVIDENCE SHOWS THAT APPELLANT PERFORMED ONLY THE PERSONAL SERVICES OF A MIDDLE-

MAN AND DID NOT PERFORM THE SERVICES OF A BROKER.

Appellant's only duties under the contract with Respondent were to find a prospective purchaser for oil and gas leases, and to introduce this prospective purchaser to Respondent. He had no authority and was not directed to do anything else. As soon as the introduction was made Appellants services were at an end. He was not required under the contract to find a purchaser who was "ready, able and willing" to purchase the property, nor was he required to be present nor was he present during the negotiations between the prospective purchaser and the Respondent, and he had no power to influence the decisions of the negotiating parties. These are the facts which form the basis for the claim that Appellant was a mere middleman, and which distinguish his services from those of a broker. Respondent denied the existence of any agreement and therefore produced no evidence as to its terms. The Trial Court specifically found that such agreement did exist. All other evidence in the record shows only an agreement for the personal services of a middleman. Numerous cases with similar facts were discussed in the argument of Point I (A) of Appellant's Brief, and Appellant does not feel that it is necessary to discuss these cases again. Appellant also feels that the

question of the application of the Real Estate Brokers Statutes to the oil and gas business was adequately discussed, and does not require further discussion.

Appellant has also pointed out the conflicting theories that prevail concerning the nature of an oil and gas interest, and that this Court has not decided whether an interest in an oil and gas lease is "Real Estate." Sections 40-6-1, et seq. *Utah Code Annotated*, 1953 (1957 Supp.), as also pointed out, seem to indicate that the Lessee's interest is only the right to appropriate the oil and gas produced, the logical conclusion therefore being that the interest, is in the nature of a profit a pendre, and not real estate.

POINT II.

THE TRIAL COURT DID NOT ERR IN HOLDING THAT PLAINTIFF IS NOT BARRED FROM RECOVERY BECAUSE OF THE PROVISIONS OF UTAH CODE ANNOTATED, 1953, 25-5-1 AND 25-5-4, SUBDIVISION 5.

Plaintiff has heretofore argued that an interest in an oil and gas lease is not "real estate" and should not be governed by the statutes concerning real estate brokers, but Plaintiff does not make any claim to an interest in any real estate conveyed, and the provisions of 25-5-1, requiring a writing for conveyances of real estate, are, therefore, not in issue here.

Plaintiff is making a claim for compensation for his personal service rendered in the sale of oil and gas leases. Assuming for the purpose of argument that the leases in question are real estate, the Court did not err in holding that 25-5-4(5) did not preclude recovery. This Court is *not* committed to the doctrine that before recovery may be had for services rendered in the sale of real property, such services must be rendered pursuant to a written agreement. The doctrine to which the Court is committed is that a recovery for such services must be based on an express agreement for such services, and this agreement, or some note or memorandum thereof, is in writing, subscribed by the party to be charged therewith. *Case v. Ralph*, 56 Utah 243, 188 Pac. 640, and *Smith Realty Co. v. Dipietro*, 77 Utah 176, 292 Pac. 915, did not decide the question of whether or not this express agreement must be in writing. Both of those cases merely held that the pleadings therein did not plead an express contract, and they, therefore, did not state a cause of action. Nor do the cases of *Mifflin v. Shiki*, 77 Utah 190, 293 Pac. 1, and *Barnard v. Hardy*, 77 Utah 218, 293 Pac. 12, stand for that proposition. Those cases were decided against the broker because the properties were sold under different terms than were found in the brokers' contracts. Neither case held that the express agreement must be in writing.

Ney v. Harrison, 5 Utah (2d) 217, 299 P. (2d) 1114, is the latest pronouncement of this Court concerning Section 25-5-4(5). In that case there was ample evidence to prove an express oral contract to pay a commission for the sale of defendants' property. The earnest money contract on which the sale was made contained a provision which recited the terms of the sellers' agreement to pay a commission and was signed by the defendant. The Supreme Court held that this memorandum was sufficient to satisfy the statute, and held:

A memorandum, in order to make enforceable a contract within the statute, may be any document or writing, formal or informal, signed by the party to be charged . . . which states with reasonable certainty:

(a) each party to the contract either by his own name, or by such a description as will serve to identify him . . . and

(b) the land, goods or other subject-matter to which the contract relates, and

(c) the terms and conditions of all the promises constituting the contract and by whom and to whom the promises were made.

The Supreme Court further stated:

. . . our statute, unlike that of many states,

does not call for the contract itself to be in writing; it is enough if there is "some note or memorandum thereof" which evidences the contract.
(Emphasis added)

The rule, therefore, is: An oral contract to pay a commission, entered into before the services are rendered, and later reduced to a note or memorandum, signed by the party to be charged and setting forth the terms of the contract, will satisfy the statute.

The Trial Court properly held that the letter sent to plaintiff by defendant fully satisfies the requirements set down in *Ney v. Harrison, supra*, to wit:

- (a) it is signed by the party to be charged;
- (b) it states with certainty the parties to the contract, the subject-matter of the contract and the terms and conditions of the contract.

CONCLUSION

Appellant performed personal services under a contract with Respondent, which contract was evidenced by a written memorandum. Appellant has not been compensated for these services and Respondent has admitted that it does not claim the money. The Trial Court should

therefore be ordered to grant judgment as prayed for
by Appellant.

Respectfully submitted,

BEN D. BROWNING and
JOHN H. ALLEN

Attorneys for Appellant

1020 Kearns Building,
Salt Lake City 1, Utah