

1959

# Lewis F. Hansen dba Hansen Realty Co. v. Ivy B. Snell : Brief of Respondent

Utah Supreme Court

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Richards, Bird and Hart; Attorneys for Respondent;

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

FILED

FEB 10 1960

LEWIS F. HANSEN, dba  
Hansen Realty Company,

Clerk, Supreme Court, Utah

*Plaintiff and Respondent.*

Case No.

vs.

9169

IVY B. SNELL,

*Defendant and Appellant.*

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BRIEF OF RESPONDENT

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RICHARDS, BIRD AND HART  
*Attorneys for Respondent.*

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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LEWIS F. HANSEN, dba  
Hansen Realty Company,

*Plaintiff and Respondent.*

vs.

IVY B. SNELL,

*Defendant and Appellant.*

Case No.

9169

## BRIEF OF RESPONDENTS

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### STATEMENT OF FACTS

Respondent takes no exception to the statement of facts in the brief of appellant. Such disagreement as exists between the parties as to the evidence and in what light it is before this Court will be pointed out in the argument.

It appears that there is duplication in the several points enumerated in appellant's brief, evidenced by the fact that points 5, 8, 9 and 10 simply incorporate by reference arguments made under other captions.

As to the other points, respondent will use the same numbers as those contained in the brief of appellant but will state the points affirmatively to respondent.

POINT 1. SECTION 42-2-1 UCA 1953 DOES NOT PRECLUDE MAINTENANCE OF THIS ACTION.

This statute, which is quoted at page 17 of appellant's brief, clearly distinguishes between the name which a party may use for his business and the affidavit which a person must file. The affidavit is to contain the full name of the party; but the fictitious name, use of which brings the statute into play, is the use of a name "other than the real name." In this case the plaintiff has used his real surname, calling his business the "Hansen Realty Company." Hansen is the party's real name and therefore the statute has no application to this case. This is the plain conclusion of the annotations in 45 ALR 198 at 258, and 42 ALR 2d 516 at 558. The following cases in these annotations are in point: Johnston v. Ellis, 49 Idaho 1, 285 p. 1015; Messick v. Haux Bros., 105 Cal. App. 637, 288 p. 434; Cone v. Ballou, 251 N.Y.S. 791; Asplund v. Pearce, Porter & Martin, 181 Okla. 320, 73 P. 2d 866. This Court has not ruled on this question.

Even if it be assumed, for purpose of argument, that the statute has application to the facts of this case, the authorities are overwhelming that this is no bar or disability to bringing action on a matter involved in the business. 45 ALR 198 at 208, 216; 42 ALR 2nd 516, at 524-525. There is no contrary case to this assertion and the cases holding that the statute is not a bar to maintenance of the action include the following: Oakason v. Lisbon Valley Uran. Co. (D.C. Utah) 154 F. Supp., 692; Gallafent v. Tucker, 48 Ida. 280, 281 p. 375; Grody v. Scalone, 408 Ill. 61, 96 N.E. 2d 97; Ambro Adv.

Agency v. Speed-Way Mfg. Co., 211 Iowa 276, 233 N.W. 499. Again, this Court has not previously passed on this question.

## POINT 2. THE AMOUNT OF THE COMMISSION WAS ESTABLISHED.

It is true that Exhibit 1-P calls for "the Salt Lake Real Estate Board Commission"; the complaint prayed for commission in the amount of \$2,150 (R. 2) and there was no controversy whatsoever as to this being the correct amount.

Paragraph 6 of the complaint (R. 2) alleges "the real estate commission called for by said Exhibit 1 is 5% of \$43,000 or \$2,150." The amended answer in paragraph 11 "denies that plaintiff is entitled to the sum of \$2,150 or any other sum for a commission \*\*\* and alleges the fact to be that plaintiff has in the manner above alleged been representing the proposed purchaser." (R. 8) Thus no issue was made as to the amount of commission but only to the question of whether the commission had been earned.

No issue was made as to the amount of the commission at the pre-trial, the Court thus framing issue No. 3: "Has plaintiff performed in accordance with the terms of the said contract so as to be entitled to receive and collect his commission?" (R. 12) The phrase, "his commission" could apply to nothing other than the amount of commission as alleged in the amended complaint. One of the purposes of pre-trial is to reduce the issues.

## POINT 3. THE EVIDENCE SHOWS THE BUYER TO HAVE CONTINUED TO BE READY, WILLING AND ABLE TO PURCHASE.

Appellant overlooks in his brief the letter from the at-

torney for the purchaser of February 26, 1959 (Exhibit 7) as specified in Finding No. 7. (R. 88)

The buyer is shown by this letter and by its original contract (Exhibits 2, 11, 7) to be anxious to purchase this property either for cash or on any terms as to payment which the seller would specify, provided the interest be the legal interest of six per cent (6%). This interest continued right to the time of trial. (R. 20) Appellant is attempting to inject into "ready, willing and able to buy" an acceptance of the demand for ten per cent interest. Whether this demand was within the power of appellant to dictate as one of the "terms" is considered under Point 4.

POINT 4. WHERE THE CONTRACT IS SILENT AS TO INTEREST THE LEGAL RATE OF SIX PER CENT (6%) IS APPLICABLE.

As appellant recognizes, this is a two-part argument: First, does the legal rate become the maximum where the contract does not specify a higher rate; and second, does discretion as to "terms" include discretion to establish a rate of interest higher than "the legal rate?"

As to the first point, the purpose of the statute seems to be plain. The phrase "legal rate" does not apply to the rate that will apply to judgments, nor to the maximum amount that may be collected and seems to refer to the normal, ordinary rate of interest that may be applied to actual or implied contracts where interest is called for and no rate has been agreed upon. If this is not the purpose of Section 15-1-1, UCA, 1953, then the purpose escapes us. This is the holding and the rationale of the following cases: *State v. Danielson*, 22 U. 220, 223, 247 P. 2d 900; *Baker Lumber Company v. Clark*, 53 U. 336, 350, 178 P. 764; *Salt Lake Wet Wash Laundry v. Colorado Animal By Products*, 104 U. 385, 388, 140 P.



2d 344; *McCarty v. Harris*, 216 Ala. 265, 113 So. 233; *Keystone Hardware v. Tague*, 246 N. Y. 179, 58 N.E. 27, 53 A. L. R. 610; *Cavanna v. Brooks*, 97 N. J. Eq. 329, 127 At. 247, 37 A. L. R. 360, 374, 375.

Appellant wants to read in the phrase "terms to suit seller" the power to fix interest rates, which, coupled with other provisions, will enable the seller to raise the price if she finds a purchaser eager to buy. This would make the contract illusory and the conduct of the seller and the plaintiff fraudulent so far as the purchaser is concerned. A person listing a property for sale at \$43,000.00 could not find a better purchaser than the plaintiff here has produced. Bennett Motor Company was willing to buy the property for cash or upon any terms which the seller cared to specify and has not balked at the terms proposed by the seller, in the communication of January 26, except as to the rate of interest, which when combined with the small monthly payment would compel the purchaser to buy the property nearly twice over before it is paid for.

In order to make the problem more simple and still accurate, let us reduce the letter of January 26, 1959 (R. 9) to a proposal that the \$43,000.00 be paid \$5,000.00 down and \$4,800.00 per year at 10% per annum. Interest the first year becomes \$3,800.00 instead of \$2,280.00, leaving a reduction of principal in the amount of \$1,000 instead of \$2,520.00, or more than twice the reduction in principal.

The 10% contract on the \$38,000.00 would be paid off in 17 years with total payments of principal and interest in the amount of \$78,898.00: Whereas at 6% it would be paid off in 11 years and the total payments would be \$52,937.00. Total payments, including down payment of \$5,000.00 would be \$83,898.00 as against \$57,937.00 at 6% or a difference of \$25,961.00.

This obviously was a ruse not within the contemplation

of any of the parties until the seller realized that the purchaser was anxious to purchase the land and not merely "ready, willing, and able."

Did reservation of "terms to suit seller" include the power to fix interest at higher than the legal rate?

Obviously "terms" does not include price in this instance, since the price was stated in the sales agency contract. Likewise, it would seem, "terms" does not include interest since interest is established by law at the legal rate unless the contract specifies otherwise. "Terms" should therefore include only those provisions and conditions other than the price and rate of interest. The power to fix terms ordinarily includes the power to fix the amount, time and manner of payments to be made on the purchase price. *Nakdimen v. Fort Smith and Van Buren Bridge Co.*, 115 Ark. 194, 172 S. W. 272; *Federal Land Bank of New Orleans v. Miller*, 199 Miss. 615, 25 So. 2d 11 at 13, *City of Clovis v. Southwestern Public Service Commission*, 49 N. M. 270, 161 P. 2d 878 at 886, 161 ALR 504. This question is specifically treated in Words and Phrases under the title "terms" and at 86 CJS 604, 62 CJ 718, note 85 and 719 note 95. Generally speaking, the phrase means the right to establish the amount, time and manner of payment, and there is no case referred to in these digests, nor which counsel has been able to find after a careful search, which holds that "terms" includes interest.

POINT 6. PLAINTIFF'S BUYER IS READY AND WILLING TO PAY SIX PER CENT (6%) INTEREST.

The original attempted acceptance executed by plaintiff's buyer was an offer to pay seller's price if she would fix the terms (Exhibit 2).

This buyer's response to the appellant's statement of her terms indicated a continued willingness by objecting only to the ten per cent (10%) interest:

“ . . . on any reasonable terms other than for cash. But when you arbitrarily read an exorbitant interest rate into a written contract, which leaves the rate blank, you are not reasonable, nor fair, and we will not be imposed upon just because we want to buy.” (Exhibit 7)

This buyer recognized, as the statute above cited does, that the legal interest rate is six per cent (6%) and the letter makes plain that it is the excessive rate only which is objected to. The court properly inferred in its findings, that which was implicit in the letter, Exhibit 7, that the buyer would pay six per cent (6%). Also plaintiff informed defendant that his buyer was willing to meet any terms, with six per cent (6%) interest (R. 28).

#### POINT 7. ATTORNEY'S FEES SHOULD HAVE BEEN ALLOWED BY THE COURT.

The court was asked to fix attorney's fees on the basis of the pleadings and evidence of the appearances which had been made in the case. (R. 33) There was no objection to this by the defendant and no comment by the Court.

The Sales Agency Contract (Exhibit 1-P) provided:

“I agree to pay you the commission above stated, and in case of the employment of an attorney to enforce any of the terms of this agreement, I agree to pay a reasonable attorney's fee and all costs of collection.”

The Court found that this recital was made in the con-

tract, that plaintiff was compelled to employ an attorney and that:

“Plaintiff requested and defenant assented that the matter of attorney’s fees could be fixed by the Court without evidence other than the files and pleadings and appearances in connection therewith and the trial of the case.” (R. 89)

And then concluded that plaintiff was not entitled to attorney’s fees, R. (89) from which the plaintiff cross appealed. (R. 92)

The Court has power to award attorney’s fees upon the files and records in the action. John C. Cutler Ass’n v. DeJay Stores, 3 U. 2d 107, 27a P. 2d 700. And plaintiff was entitled to attorney’s fees in this case.

## POINT II. PLAINTIFF HAS EARNED HIS REAL ESTATE COMMISSION.

Under the contract between the parties it was not necessary that a sale be consummated before plaintiff had earned his commission. Under their agreement (Exhibit 1-P) it was incumbent upon plaintiff to:

“Find a buyer who is ready, able and willing to buy said property, or any part thereof at said price and terms, or any other price or terms to which I may agree in writing. . . .”

It is obvious from the testimony and the documentary evidence that plaintiff produced a buyer anxious to buy the property, and able so to do, either for cash or for any terms which the seller might reasonably specify—or unreasonably, either, so long as the interest was at the legal rate.

Defendant told plaintiff and another real estate man that she had concluded not to sell the property, (R. 76-77) and these agents informed the defendant that she had sold her property, and it was up to her to name the terms, "And we'll conform to it, within reason." (R. 74)

Under the Utah cases,, if a real estate broker produces a buyer ready, willing and able to buy and the seller capriciously or arbitrarily fails or refuses to consummate the transaction, this will not preclude recovery of the commission by the broker, *Hoyt. v. Wasatch Homes, Inc.*, 1 U. 2d 9, 261 P. 2d 927; *Curtis v. Mortensen*, 1 U. 2d 354, 267 P. 2d 237.

The Court may be interested in the academic inquiry of whether the buyer in this case would be entitled to specific performance. Interesting cases in this field are to be found in 23 ALR 2d 164 at 190-211, also 68 ALR 2d 1221 at 1230-33. This is a subject for another lawsuit.

## POINT 12. PLAINTIFF WAS NOT UNFAITHFUL TO DEFENDANT.

Defendant knew that plaintiff's business was real estate and says she called him with reference to this property because she wanted him to have the sale. (R. 40) Then when the plaintiff brought his earnest money receipt for signature, the defendant refused to sign and refused to state the terms upon which she would sell. (R. 45-46) Since the plaintiff talked to the defendant concerning the attempted acceptance of the listing by Bennett Motor Company, there is no question in this case of misleading or a breach of the fiduciary duty by representing another party. It was known to both parties that the plaintiff was representing both the buyer and the seller as agent and was looking to the seller for his commission. The

two cases cited by the appellant are therefore not in point in this case.

## CONCLUSION

The evidence in this case supports the findings of fact and shows that plaintiff found a good buyer for the defendant, ready, willing and able to buy and that all defendant had to do was sell for cash or indicate the terms she would accept in order to consummate the transaction. It appears that actually she had concluded not to sell and so told plaintiff and the other real estate broker. Later, she concluded to submit terms with an exorbitant interest rate which the buyer again approved and accepted conditioned upon keeping the interest rate to the legal rate. As of the time of the trial, and as of the time of this brief, the buyer is still ready, willing and able to buy if the seller will stand by her original listing of \$43,000 cash or will state terms with interest at the legal rate.

Respondent has no explanation of why the District Court did not fix attorney's fees and contends that the case should be affirmed except as to attorney's fees and that it should be remanded so that the District Court may fix attorney's fees upon the records before the Court.

Respectfully submitted,

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