1967

Real Estate Exchange v. Mark Allen Kingston and Dorothy Kingston : Appellant's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

REAL ESTATE EXCHANGE,
A Corporation,

Plaintiff,

vs.

MARK ALLEN KINGSTON and
DOROTHY KINGSTON,

Defendants.

Case
No. 10639

APPELLANT'S BRIEF

APPEAL FROM JUDGMENT OF THE SECOND DISTRICT
COURT FOR WEBER COUNTY,
HONORABLE PARLEY E. NORSETH, JUDGE

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NATURE OF CASE

Plaintiff, a licensed real estate broker, sold real property of defendants that was listed with plaintiff for sale and seeks payment of the agreed sales commission.

DISPOSITION IN LOWER COURT

The Honorable Parley E. Norseth, sitting without a jury, dismissed the Complaint of the plaintiff.

STATEMENT OF FACTS

On February 15th, 1964, defendants were the owners of certain real property located at Mountain Green, Morgan County, Utah, upon which there was a commercial venture known as "The Wheel". This operation consisted of motels, store, restaurant, camping facilities, service station and trailer park. This property was listed for sale with plaintiff, a licensed real estate broker (Plaintiff's Exhibit A). At the same time, plaintiff had received a listing to sell real estate belonging to George W. Malloy and wife, Audrey M. Malloy (T. 39). Plaintiff, through one of its sales agents, Mr. R. Gene Allphin, brought the Kingstons and Malloys together and as a result plaintiff's Exhibit B was drawn up, which was an Earnest Money Receipt and Offer to Purchase on the form approved by the Utah State Securities Commission. This offer was accepted by the sellers (Kingstons) and provided for a total sales price for the "The Wheel" for Sixty-six Thousand Dollars ($66,000.00) with down payment of buyers' (Malloys) equity in their Davis County property which was agreed to be Seven Thousand Two Hundred Dollars ($7,200.00), and Five Thousand Dollars ($5,000.00) to be paid on delivery of the deed or final contract, and further that the offer was subject to buyer (Malloys) obtaining satisfactory financing. The Malloys were not able to obtain satisfactory financing or any financing at all, which Mrs. Kingston was aware of, inasmuch as she accompanied

Malloy to four lending institutions for this purpose and Malloy was refused credit at each one. (T. 56)

The offer to purchase represented by Exhibit B was not pursued for this reason and on July 24, 1964, another Earnest Money Receipt and Offer to Purchase was made up by plaintiff (Exhibit C) and presented to the defendant, Dorothy Kingston, for acceptance. This offer was accepted the same day by said defendant and provided for a sales price of Sixty-six Thousand Dollars ($66,000.00) with the down payment being the equity in buyers' (Malloys') real property and home in Davis County, which was agreed to be in the amount of Seven Thousand Two Hundred Dollars ($7,200.00). Defendants knew that plaintiff had a sales listing on the Malloy property as well as on defendants' property and that plaintiff was working for and representing both buyer and seller. (T. 49, 50).

Pursuant to the acceptance of this offer to purchase by defendants, plaintiff prepared a Uniform Real Estate Contract, (Exhibit 1) which was signed by George W. Malloy and Audrey M. Malloy as buyers and Mark Allen Kingston and Dorothy Kingston as sellers and which was dated August 28, 1964, an Escrow Agreement dated August 28, 1964, was then prepared which was signed by the sellers and buyers and was not signed by the plaintiff broker. At this time a Warranty Deed was prepared by plaintiff which conveyed to Kingstons, the defendants, all of the interest of the Malloys in their real property in Davis County, which deed was recorded in the Davis County Recorder's Office on October 16, 1964. (Exhibit 3). A Bulk Sales Affidavit was prepared which recited "No creditors of The Wheel" and closing statements were prepared and issued to Malloys on the sale of their property and to the Kingstons on their property (Exhibits 9 and 10). An Escrow Agreement (Exhibit 2) was prepared together with a Warranty Deed for the defendants' property (Exhibit 6) and said Escrow Agreement,

together with the Warranty Deed from the defendants, the Uniform Real Estate Contract, Bulk Sales Affidavit and an Inventory of Equipment were deposited on October 15, 1964, with the First Security Bank of Ogden, Utah.

Malloys, the buyers, entered into possession of the Kingston property on July 25, 1964, and remained until October 30, 1964 (T. 62), when they abandoned it because the property was not as represented by Mrs. Kingston (T. 63, 64, 65, 66, 67 and 68), during which time they paid, in addition to the $7,200.00 down payment, the sum of $270.00 on August 25, 1964 (Exhibit F), and on September 25, 1964, the sum of $375.00 (Exhibit G). Defendants made demands upon the First Security Bank, the escrow agent, for the return of the documents held in escrow and the same were returned to the defendants.

At the conclusion of plaintiff's evidence the defendants declined to offer testimony and the Court granted defendants' Motion for Summary Judgment as it was designated by the Court and in so doing stated that the grounds were that the plaintiff had agreed to accept its commission out of monthly payments and the monthly payments were not forthcoming.

Although the Court found against the plaintiff on the single ground indicated above, the Court signed Findings of Fact and Decree which found against the plaintiff on three separate grounds and although it would appear that this appeal should only be on the basis of the findings of the court as stated at the conclusion of the trial, nevertheless the plaintiff, in this Brief, shall controvert the Findings of Fact and Decree as signed.

ARGUMENT

POINT 1. THE COURT ERRED IN FINDING THAT THE PLAINTIFF DID NOT OBTAIN AN ABLE AND WILLING BUYER OF THE PREMISES OF THE DEFENDANTS.

It has long been the law in this state, that a real estate broker has fulfilled his part of the listing agreement by having produced purchasers who were ready, willing and able to buy the listed property on terms acceptable to seller, and is entitled to his commission if he does so. *Curtis vs. Mortensen,* 267 P. 2d, 237, 239, 1 Utah 2nd 354., *F.M.A. Financial Fund vs. Build, Inc.,* 404 P. 2, 670, 17 Utah 21 80, *Garff Realty vs. Better Builders, Inc.,* 234 P2, 842, 120 Utah 334.

Such were the terms of the listing contract between the parties hereto, the listing agreement (Exhibit A) providing as follows:

> "I agree upon the considerations hereinabove mentioned to pay six per cent (6%) commission covering such transactions whether such sale *or exchange* be made by you or me or any other person acting for me or in my behalf at the price and upon the terms stated on the reverse side hereof, or at any other price and any other terms acceptable to me; * * * * * *
>
> "No exchange for property to be transferred to me is to be made unless the property to be received by me is approved in writing. *If an exchange is made,* I agree to pay commission to you on the above sale price, *and that you may collect commissions on all property involved in the transaction.*" (Italics ours).

Defendant's counsel, evidently with the intention of confusing the issue, made much out of the fact that the listing was for $75,000.00 but that the sale was for $66,000.00. No money was realized by defendants and therefore plaintiff had not complied with the listing contract. However, the Listing Agreement (Exhibit A) as noted above, provided for sale or exchange if the sale or exchange be made at the price or terms stated or *at any other price or terms acceptable to the sellers.* No one can seriously contend that although the listing contract price was $75,000.00 that defendants are not bound to pay a sales commission because the

sale was for $66,000.00. The defendants have accepted the offer and terms of the buyer and have by so doing stated that the price and terms were acceptable to them. Further, it was agreed "*If an exchange is made, I agree to pay commissions to you on the above sale price and that you may collect commission on all properties involved in the transaction.*" (Italics ours). It would seem, therefore, that defendants are in no position to complain that the plaintiff did not provide them with an "able" buyer inasmuch as they did not receive cash from the buyer, because by the very terms of the listing contract, they contemplated that there would be an exchange of properties and that if there was an exchange that they would pay a commission on the sale and on all other properties involved in the transaction.

In order to entitle a broker to a commission under such an agreement, our courts have not even required that a binding contract be entered into (*Curtis vs. Mortensen* Supra.), however, in the case before the bar, not only one, but two binding contracts were entered into between the purchasers and sellers. The first being the Earnest Money Receipt and Offer to Purchase signed by the Malloys as purchasers as accepted by Dorothy Kingston as seller (Exhibit C) and the second being the Uniform Real Estate Contract signed by Mr. and Mrs. Malloy as buyers and Mr. and Mrs. Kingston as sellers (Defendants' Exhibit 1).

The sellers have received approximately $7,000.00 by way of exchange of property from Malloys and $645.00 in cash. Malloys testify that the reason he gave the property back to Kingstons was because of the misrepresentations of Mrs. Kingston, the seller, in regard to income capabilities of the property and debts. Can it seriously be contended that the buyers, Malloy, were not "willing and able"? If they were not, this was a fact well known to Mrs. Kingston inasmuch as she accompanied Mr. Malloy to four lending institutions with the purpose of Mr. Malloy obtaining a

$5,000.00 loan or any loan to add to the down payment and she was well aware of the fact that he could not qualify for this purpose with these lending institutions.

A recent Utah case and the one most nearly in point is *F.M.A. Financial Corp. vs. Build, Inc.*, 404 P. 2d 670, 17 Utah 2d 80. An apartment house was listed with Cook Realty Co., the seller agreeing to pay a 5% commission on the sale price. Through the efforts of the realtor, the seller entered into an Earnest Money Receipt and Exchange Agreement to sell the apartment house for $77,500.00 and received from buyers a duplex valued at $25,000.00 as a down payment. A Promissory Note was given for the sales commission and when not paid, suit was brought on the note. The seller, although retaining the $25,000.00 down payment, defended the suit claiming lack of consideration because the buyers, within 60 days after the sale became dissatisfied and brought suit for rescision which was successfully defended by seller.

The Court held as follows:

> "It is indeed the obligation of the real estate broker to produce a buyer willing and able to purchase the property who enters into an agreement to do so; and that this be done without any dishonesty, fraud or misrepresentation which will leave the seller vulnerable to a loss of his bargain. But that is the extent of his obligation and when it is done he cannot be held to be an insurer against the possibility that the buyer may become dissatisfied with his bargain and bring a lawsuit claiming the right of rescision."

What the established rules of law governing a broker's right to a commission are, are stated in the California case of ***Lipton*** *vs. Johansen* 233 P. 2d 648 as follows:

> "II. A broker's commission is earned when the vendee and vendor have executed a binding written agreement between them upon the terms provided in the contract of employment

of the broker and the vendee is ready, willing and able to perform the contract on the terms prescribed.

"III. *The readiness, willingness and ability of the vendee are conclusively presumed in a suit by a broker to recover his commission upon proof that the vendor has entered into a valid contract for purchase and sale with the vendee.* (Italics ours)

"IV. The right of the broker to his commission is not affected by failure of either party to carry out the agreement."

In the case of *Diamond vs. Huenergardt* 346 P. 2d 37 (Cal.) it is set out as follows:

"It is settled law that where the owner of property accepts the offer made by a person produced by the broker employed to make the sale, he thereby admits the readiness, willingness and ability of the purchaser to consumate the sale and the owner is estopped to deny purchaser's ability or willingness to complete the purchase."

In the case of *Austin vs. Richards* 304 P. 2d, 1932 (Cal.) it was held as follows:

"The execution of a contract of sale by the vendor of realty was conclusive proof that he was satisfied as to the qualifications of the purchaser and of purchaser's ability to perform the contract and vendor was liable for broker's commission and was estopped by such approval from denying such liability."

Also in point, see *Beazell vs. Kane* 274 P. 2d 224 (Cal.); *Cardoza vs. Moorehouse* 17 Cal. Reports 28; *Myer vs. Selggio* 181 P. 2d 690, 692 (Cal.); *Malmstedt vs. Stillwell* 294 P. 41 P. 41 (Cal.).

The trial court has apparently taken the position that the broker is an "insurer" of good and faithful performance on the part of the buyer and that the buyer will never become dissatisfied with his bargain and default or attempt to rescind. The case of *F.M.A. Financial Corp. vs. Builders, Inc.* (Supra.), stands firmly

for the proposition that the broker cannot be held to be an insurer against such possibilities.

Under the facts of the case, it is ridiculous for defendants to contend and error for the Court to find that the plaintiff did not obtain a willing and able buyer for the defendants. Plaintiff did all he was employed to do and defendants had accepted the terms of the offer of the Malloys and had accepted the Malloys as "ready, willing and able buyers".

POINT 2. THE COURT ERRED IN FINDING THAT THE PLAINTIFF WAS AN UNDISCLOSED AGENT FOR FEE FOR BOTH THE BUYERS AND SELLERS IN SAID SUBJECT TRANSACTION.

Inasmuch as the defendants declined to testify, the only evidence on this point would have to come from the plaintiff and its witnesses. The only evidence before the Court is as follows:

Transcript Page 49:

"BY MR. HANDY:

Q. Your name is R. Gene Allphin and you have previously testified in this matter and taken the oath?

A. Yes.

Q. Mr. Allphin, will you state whether or not at any time you informed Mrs. Kingston that the Real Estate Exchange had a listing on the property of the Malloys' as well as on The Wheel?

A. Yes, I did.

Q. And when was this conversation had?

A. When I showed her the Malloy property, I told her that I had the listing.

Q. On the Malloy property also?

A. Yes.

Q. Now, did you have a conversation where you informed Mrs. Kingston that you were working for both parties in this matter?

A. Yes.

Q. Where and when?

A. When I wrote up the final contract."

Transcript Page 51:

"THE WITNESS: The day that I made the Earnest Money Contract between the Malloys and Mrs. Kingston at The Wheel. When they sat down at this table and talked this arrangement over between them, I told them at that time I represented both parties and I couldn't take side issue.
MR. HANDY:

Q. Was there anything said about that by either party?

A. No."

If this testimony had been false, it would have been a simple thing for the defendant to be sworn and deny such testimony. Further, in aiding the Court to arrive at the truth of the matter, it would have been the duty of the defendant, if such testimony was false, to deny it. Defendants made no claim to the Court of prejudice. It is also significant that when the Court pronounced its decision and rendered Judgment at the conclusion of the evidence, this point was not mentioned by the Court nor referred to in the slightest manner.

The defendants were well aware that this transaction involved an exchange of properties. They were well aware that the Real Estate Exchange had a listing on both of the properties to be exchanged and further in the Exclusive Sales Agency Contract identified as plaintiff's Exhibit A, it authorized the plaintiff to either sell or exchange the property of seller and agreed "If an exchange is made, I agree to pay commission to you on the above

sale price *and that you may collect commissions on all properties involved in the transaction.*"

POINT 3. THE COURT ERRED IN FINDING THAT PLAINTIFF HAD AGREED TO ACCEPT PAYMENT OF THE COMMISSION OUT OF THE MONTHLY PAYMENTS MADE IN ACCORDANCE TO THE ESCROW AGREEMENT AND THAT THE PURCHASERS MADE NO PAYMENT ON SAID CONTRACT EXCEPT AS HEREINBEFORE SET FORTH.

The Court obviously was in error in finding that no payments had been made on the contract except the $445.00 mentioned in paragraph 7 of the Findings in that even a casual consideration of defendants' Exhibit No. 1, which is the Uniform Real Estate Contract, shows that the sellers acknowledged receiving $6,880.00 as a down payment from the purchasers and just as casual an observation of plaintiff's Exhibits F and G show that an additional $645.00 was paid to the sellers by the purchasers.

It is important to recall the sequence of events in this matter. On February 15, 1964, defendants signed an Exclusive Sales Agency Contract with plaintiff which provided for the payment of a six per cent (6%) commission on sale or exchange of defendants' properties (Exhibit A); on July 7, 1964, an Earnest Money Receipt and Offer to Purchase was signed by George W. Malloy and Audrey M. Malloy as Buyers, and Dorothy Kingston as Sellers (Exxhibit B); on July 24, 1964, Earnest Money Receipt and Offer to Purchase was signed by George W. Malloy and Audrey M. Malloy as Buyers and Dorothy Kingston as Seller (Exhibit C); on August 19, 1964, Uniform Real Estate Contract which incorporated the terms of the July 24, 1964 offer and which was signed by Malloys as Buyers and Mark Allen Kingston and Dorothy Kingston as Sellers; on August 28, 1964, an Escrow Agreement, signed by Malloys as Grantees and Kingstons

as Grantors (Exhibit 2); on the same date a Warranty Deed from the Malloys to the Kingstons for the Malloys' interest in the Davis County property was executed (Exhibit 3), together with the other necessary documents.

The above sequence of events is necessary in order to show that well before the Escrow Agreement was signed by Buyer and Seller, and to which plaintiff was not a party, the plaintiff had found a ready, willing and able buyer for the Seller on terms aceptable to the seller and was therefore entitled to his commission (*Curtis vs. Mortenson* Supra.). Plaintiff had fully performed his part of the contract known as the Exclusive Sales Agency Contract and at that time was entitled to his commission for services rendered.

There can be no doubt that on August 19, 1964, when the Uniform Real Estate Contract was signed by both buyers and sellers incorporating the terms of the July 24th Earnest Money Receipt and Offer to Purchase that plaintiff had fully performed his obligations under the contract and had earned its commission (*Curtis vs. Mortenson* supra., *F.M.A. Financial Corp. vs. Build, Inc.*, supra., *Lipton vs. Johansen* 233 P. 2d 648 (Cal.), *Cardoza vs Moorehouse* 17 Cal. Reports 28, *Diamond vs. Huenergardt* 346 P. 2d 37 (Cal.) *Austin vs. Richards* 304 P. 2d 132 (Cal.).

The Court has erroneously concluded that the expression contained in the Escrow Agreement "The escrow agent is *authroized* to expend from each monthly payment received the following: "* * also $87.50 payable to Real Estate Exchange at 2421 Kiesel Ave., Ogden, Utah, until the real estate commission in the amount of $3,900.00 is paid in full", (italics ours) was an agreement on the part of plaintiff to accept its commission piecemeal when and if certain agreed payments are made by the buyer. Nowhere in this agreement, to which plaintiff was not a party, does plaintiff substitute its right to a commission already earned for one which

may never be received. It is folly to so contend and so find. It cannot, by the weirdest stretch of the imagination seriously be contended that the sellers' direction to the escrow agent to distribute a portion of the monthly payment to plaintiff to apply on the fee earned was an agreement on the part of plaintiff to forego its commission except and when the monthly payments were made. Clearly, the intention of the parties was that even though the listing agreement provided for payment of a real estate commission in the event of an exchange of properties, that inasmuch as sellers-defendants had not received cash for their equity that plaintiff should at least have the security of receiving a portion of the monies received on the contract until such time as the Malloy property received in exchange as a down payment was sold (T. 37). There never was an assignment of the Escrow funds or any part to plaintiff. And plaintiff, not being a party to the Escrow agreement, never could have urged the enforcement of any of its provisions on his behalf. Can it seriously be contended that the plaintiff would forego its right to the commission as agreed, when it had obtained the conveyance to defendants of an equity in Malloys' property valued at from $6,880 to $7,200 and had the deed recorded? To so find would be to find that a new contract had been entered into between the plaintiff and the defendants after the plaintiff had fully earned its commission and such new contract, if any, is totally without consideration, and therefore would be void and not binding on the plaintiff. Conclusive on this point is the following quote from *F.M.A. Financial Fund Corp. vs. Build, Inc.*, Supra.:

> "The plaintiff's claim of accord and satisfaction is premised on a statement which it avers that Mr. Cook (of Cook Realty) made to Mr. Stromness in talking over the difficulties the latter was having with the sale: 'Richard, make one more payment today and let's forget the whole thing' and that

the defendant made such a payment. *The general rule, and the rule which this court has followed, is that where a claim is for a definite and undisputed amount which is past due, an agreement by the creditor (Cook) to take a lesser amount, which is paid, does not discharge the whole debt. This is so because the creditor receives only what he is entitled to and there is no consideration for the new agreement.*

"It is true that the modern trend is to be cautious about rigidly applying this rule and that courts are generally somewhat indulgent toward finding consideration somewhere in the new arrangement, such as that it was to settle a dispute, or that there is some advantage to the creditor in accepting the lesser amount, where the unreasoning adherence to the rule might result in inequity. But we perceive nothing in this case to persuade us that the trial court was wrong in failing to so judge this situation. In fact, the contrary appears. *Accepting the defendant's argument would result in giving him the duplex he received as a down payment, together with the other benefits of the sale and relieve him of his obligation to pay the agreed commission.*" (Italics ours.)

See *Am. Jur.* 2d Vol. 12, p. 798 Sec. 35:

"If a broker's contract is the ordinary one that is terminable at the will of the principal at any time if it is still executory, a modification of it need not be supported by new consideration. *Where however, there is such a mutuality or reciprocity of consideration as to deprive the principal of the absolute right of determining the contract or as to make the contract mutually obligatory, there can be no valid modification of it without some consideration moving to the party who would be adversely affected nor can there be any enforceable, substantial modification of a broker's executed contract unless the agreement relating thereto is founded upon sufficient or at least some consideration.*

"*In accordance with these principles a consideration is necessary for an agreement between the principal and broker to release earned commissions, to postpone their payment, to make such payment contingent upon the happening of cer tain events* or to withdraw from the contract after the

broker has entered upon a performance of his undertaking." (Italics ours.)

Am. Jur. 2d Vol. 12, p. 799, Sec. 36:

> "*Where, however, the contract is executed or some services had been performed by the broker, substantial consideration is necessary to support his agreement to modify the terms of the contract as to compensation.*" (Italics ours.)

To the same effect, see 12 *Corpus Juris Secundum* p. 149, Sec. 64 (Brokers):

> "In order that a broker's right to compensation may rest upon a new or modified contract rather than upon the original contract of employment, *it is essential that both parties assent to the change or modification and that a new or modified contract be based on a sufficient consideration.* (Italics ours.)

In the case of *John Reis Co., vs Zimmerli* 120 N.E. 692 N.Y., plaintiff was employed by defendant to sell certain real estate. Thereafter he found a ready, willing and able purchaser and a contract was entered into between seller and purchaser. The contract contained the following clause: "The seller agrees that Mr. Ohnewald of Reis & Company brought about this sale and agrees to pay the broker's commission therefor and who shall be entitled to his commission *upon title passing.*" (Italics ours.)

"The Court of Appeals of New York in reversing the trial Court held:

> 'At the time the contract was signed, Ohnewald had procured a purchaser and his right to his commission had accrued (citing cases). It is true that when the written contract was prepared for execution, he expressed his willingness, if it would be more convenient for defendant, to wait until title passed. But his contract with defendant had been fully executed by him and the defendant could not be released from his liability to pay commissions without a consideration (citing cases). There was no evidence of any promise on the part of the defendant to do what he was not

already obligated to do (citing cases). Ohnewald's agreement to wait was therefore Nudum Pactum and was unenforceable.' "

See also *Miller vs. Rossiter* 209 N.Y.S. 767:

"The action was for brokerage commission earned in procuring a purchaser ready, willing and able to buy on defendant's terms. A contract of sale was entered into. Immediately thereafter the broker made an agreement to wait for payment of his commission 'when as and if title closes'. Objections were made to the title and by mutual agreement, the contract was rescinded; the money paid on account returned to the purchaser and the defendants paid the expenses incurred by the purchaser.

"*The brokerage commission in this case was earned when the contract was entered into. The agreement made by the broker was without consideration and unenforceable.*" (Italics ours.)

See also *Clarke vs. Dulien Steel Products* 128 P. 2d. 608 (Cal.), *Austin vs. Richards* 304 P. 2d 133, 134 (Cal.), *LeBlond vs Wolfe* 188 P. 2d 278 (Cal.), *Cardoza vs. Moorehouse* 17 Cal. Reports 28.

If the Court were to interpret the quoted statement from the escrow instructions as being a new contract for the payment of the broker's commission, and the plaintiff was a party to such contract, the Court would still have to find sufficient consideration for the new contract, and even defendants do not so contend, not having offered any evidence whatsoever and needless to say, not on this point.

CONCLUSION

The plaintiff fully executed his contract with the defendants in that it obtained for the defendants a ready, willing and able buyer on terms acceptable to the sellers; that said buyers entered into a written, binding contract with the sellers; that through the

efforts of the plaintiff the defendants have been enriched in the sum of $7,645.00; that the sellers-defendants knew that plaintiff represented both the buyer and the seller and such a possibility was contemplated as shown by the Listing Agreement, the two Earnest Money Receipts and Offer to Purchase and the Uniform Real Estate Contract; that the only evidence before the Court was that plaintiff has disclosed to defendants-sellers such fact—that plaintiff's commission was earned prior to the Escrow Agreement being entered into between the purchasers and the sellers and there has been no modification of the contract for commission between plaintiff and defendants-sellers. For this reason the Judgment of the Court should be reversed with instructions that Judgment should be entered in favor of the plaintiff for the sum of $3,900.00 together with a reasonable attorney's fee.

Respectfully submitted,

GEORGE B. HANDY

Attorney for Appellant