

1962

Troy Miller and John U. Webber v. Albert Packer and Wendell Thompson : Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT OF THE
STATE OF UTAH

FILED

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TROY MILLER and JOHN U.
WEBBER,

Clerk, Supreme Court, Utah

Plaintiffs and Respondents,

vs.

No. 9651

ALBERT PACKER and WENDELL
THOMPSON,

Defendants and Appellants.

RESPONDENTS BRIEF

Appeal from the Judgment of the First
District Court for Box Elder County
Hon. Lewis Jones, Judge

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IN THE SUPREME COURT

Of the

STATE OF UTAH

TROY MILLER and JOHN U. WEBBER,)	
Plaintiffs and Respondents,)	
vs.)	
ALBERT PACKER and WENDELL)	No. 9651
THOMPSON,)	
Defendants and Appellants.)	

BRIEF OF PLAINTIFFS AND RESPONDENTS

RELIEF SOUGHT ON APPEAL

Respondents seek to answer appellants brief on appeal and an order of this Court for denial of such appeal.

STATEMENT OF FACTS

Respondents, as real estate salesman and broker brought together the appellants and Mr. and

Mrs. John Wallen in order that the appellants might build a home for Mr. and Mrs. John Wallen. Which home was to be constructed upon a lot and built according to the plans and specifications as approved by Mr. and Mrs. Wallen and the appellants, all for a price certain. The appellants were to construct the prefabricated home and the costs for such work, for the lot, and for all other expenses were to be included in the price certain, which price had been agreed upon prior to any work being done by the appellants. The appellants then commenced work to construct said home and progress payments were made to appellants by Mr. and Mrs. John Wallen, which money was disbursed directly to appellants by the First Security Bank of Brigham City, Utah.

Upon completion of the home Mr. and Mrs. John Wallen arranged for long-term financing at Home Benefit Savings and Loan, Salt Lake City, Utah and such loan was closed by said Home Benefit Savings and Loan in Salt Lake City. That all papers, costs and disbursements were made by such lending institution, and such papers were approved and signed by both interested parties, i.e. appellants and Wallens. Respondent Webber attended such closing upon request of the lending institution and at the request of no one else and was not acting in any capacity toward the appellants, as either a broker or an agent to advise the appellants as to their rights. Appellants were experienced in building and had closed many loans personally at financial institutions.

Prior to closing in Salt Lake City the First Security Bank in Brigham City, Utah had paid out all

Money on the construction loan to either the appellants or to Briggs Manufacturing Company for purchase of the package home. The \$500.00 check alleged to have been paid for freight was paid to the Briggs Manufacturing Company to complete payment of the package (R 151, L 13-21) and never forwarded to Thomas C. Dyer, Incorporated, who charged and collected for freight costs, which costs were to be in the total purchase price between appellants and Wallens.

Demand for \$500.00 as outlined in appellants statement of fact was made by Briggs Manufacturing Company for payment upon the package home and not made by Webber (R 148, 149).

The counter claim as filed by the appellants was filed in open court after plaintiff and respondent had completed their case and after defendants and respondents had completed their Testimony but prior to cross examination of Defendant's last witness (R 124, L 26 and R 130, L 28-30).

ARGUMENT

WANT OF JURISDICTION

Upon the face of the record on appeal as filed by the appellants this court is without jurisdiction to hear this matter pursuant to Rule 73 (a) URCP.

Appellants filed a motion to amend the judgment of the district court on the 20th day of December, 1961, which judgment was entered on the 1st day of December,

1961. Pursuant to Rule 73 (a) URCP the time for filing an appeal from such final judgment is tolled by the timely filing of a Motion to Amend Judgment under Rule 52 (b) URCP. However, said Motion to Amend and thereby toll the running of the time limit for appeal as prescribed in Rule 73 (a) URCP must be within 10 days after entry of Judgment (Rule 52 (b) URCP). It appearing on the face of the record that such timely filing was not within the time limit of one month for appeal of such ~~and~~ judgment is not tolled and appellants' appeal cannot be heard by this court for lack of this court to entertain the requisit jurisdiction of such an appeal. (Allen v Garner 45 U 39, 143 Pac 228; Sorenson v Korsgaard 83 U 177, 27 Pac 439).

The District Court by granting hearing after time for motion to amend had expired did not thereby revive the appeal time or toll the running of the time limitation for appeal, inasmuch as the District Court had thereby lost its jurisdiction to hear such a motion to amend.

And further, that even if this court should determine that such a motion to amend was timely made and the time for appeal was thereby tolled the District Court heard such motion to amend on the 14th day of February, 1962 at 11:00 A.M. (R 227, L 11-18) and the Court after hearing of said Motion to Amend took under advisement such motion, and such motion was denied on the 19th day of February, 1962, and appellants' notice of appeal was ~~February~~ ^{MARCH} 21, 1962, not within the one month required by Rule 73 (a) URCP. Notice of overruling of motion to start running the limitation on time for appeal: (Jones v Evans 38 U 291, 116 Pac 333; Blyth & Fargo Co. v Swenson 15 U 345, 49 Pac 1027; Henderson v Barnes 27 U 348, 75 Pac 759).

POINT I

COURT PROPERLY DENIED APPELLANTS MOTION TO SEPARATE THE CAUSES OF THE TWO RESPONDENTS FOR TRIAL.

Appellants brief alleges improper joinder of action under Rule 20 (8) URCP, however, said action which was filed (1) arose out of the same transaction or occurrence, which transaction was that the agreed upon price was to cover all costs of building a prefabricated home and for the ground upon which to locate such a home (Gerard v Mercer, D.C. Mont. 1945 62 F. Supp. 28). (2) That in any series of transactions common to one purpose, to-wit construction of a home over a period of time, that to separate each transaction would be multiplicitous and require substantially the same proof at each hearing to establish a foundation for an action at law and when such duplication is made to appear it is the intent of the rules of Civil Procedure to do away with such duplication. (Farni v Tesson 1 Black (US) 309).

POINT II

THE APPELLANTS BY THEIR OWN TESTIMONY CLAIM NOT TO HAVE BEEN PARTNERS IN ANY VENTURE TO ERECT THE HOME IN QUESTION, BUT APPELLANTS ALLEGE AS A DEFENSE IN THEIR BRIEF THAT THE RESPONDENTS ARE PARTNERS BECAUSE THEY WERE TO SHARE IN THE PROFITS.

The record (R 181, L 9-21) indicates at no time that the respondents were to share in the profits of the appellants. A real estate commission was to be paid not from

profits but upon the appellants making a profit. Respondents were not to share pre-se in a percentage of any profit.

Even assuming that the respondents were to share in the profit such sharing is only prima facia evidence of a partnership and that if such sharing is for the payment of a debt or otherwise then no such inference can be drawn (emphasis added) that the respondents were in any particular partners and thereby limited to recovery of profits only or to sue for an accounting as the only means to obtain relief (48-1-4 (4) (a)).

POINT III

THE COURT DETERMINED AS A MATTER OF FACT THAT MR. JOHN WALLEN PURCHASED A HOME UPON A LOT AND THAT THE PURCHASE PRICE INCLUDED THE HOME AS WELL AS THE GROUND UPON WHICH IT WAS LOCATED, (FINDING OF FACTS AND CONCLUSION OF LAW PARA.1) AND THAT THE PLAINTIFF AND RESPONDENTS, TROY MILLER, ADVANCED FOR THE BENEFIT OF THE DEFENDANTS AND APPELLANTS THE SUM OF \$1,460.00 OF WHICH ONLY \$1,000.00 HAD BEEN REPAID AND THAT THERE REMAINED AN UNPAID BALANCE OF \$460.00.

The Court as the trier of fact being in the better position to determine such matters as contested facts is given great latitude in determining such facts and such determination as made by the trial court shall be upheld unless such court is in clear and obvious error (53 Am. Jur. Trial 1144).

However, the court had sufficient information and testimony upon which such a determination could be made (R 199, L 10-16).

The appellants allege that plaintiff and respondent could not recover for unpaid portion of the purchase price because of an oral contract to purchase real property under (25-5-3, UCS, 1953), however, such statute or frauds only requires that to have any sale taken out of the statute that the party to be charged sign a memorandum or other document stating with sufficient clarity the identification and description of the subject matter (25-5-3, UCA, 1953, 49 Am Jur. 354).

The appellants cannot be allowed to sign a contract to construct a home upon a lot knowing that the full purchase price of the home agreed upon in such contract is to include all costs including ground costs (R 137, L 5-22) and then be allowed to set up the defense of the statute of Frauds and be allowed to receive an unjust gain from such defense.

With complete memorandum thus taking this matter out of the statute of Frauds, any claim for non-payment of a valid cost, the appellant cannot set up a further defense that the respondents were mere volunteers and advanced money as a gesture of cooperation knowing that the lot was to be included in the sale prior to the time the earnest money in question was executed (R 94, L 17-19) and that any money paid down was considered to be earnest money on the entire contract and to be applied against the entire contract (R 158, L 13).

Further there is no finding of any breach of a fiduciary duty or grounds for estoppel on the part of Miller and this matter being raised the first time an appeal cannot be considered by the Court.

POINT IV

JUDGMENT IN FAVOR OF RESPONDENTS WEBBER AND MILLER FOR REAL ESTATE COMMISSION SHOULD BE AFFIRMED.

Respondents acting as real estate men brought together a willing seller and a capable buyer in order that the seller Thompson and Packer might sell to the Wallens a home. Such buyers and sellers entered into a binding contract between themselves; such contract provided for the payment of a real estate commission by the seller (Plf Exhibit #1) to the agent who brought such buyer and seller together (Plf Exhibit #1, Line 41, 42).

The parties to such contract agreed to the terms contained in such contract and by the terms of such an agreement bestowed upon respondents the right to receive a real estate commission; and that the appellants are now estopped to deny responsibility for such commission, when the contract having been fully performed by both parties to such a contract, with the intent that the respondents should specifically be benefited (*Beveridge v New York Elev R. Co.* 19 N.E. 489; *Second National Bank v Grand Lodge F.A.M.* 98 U.S. 123). In *Calder v Richarson D.C.* 11 F. Supp 948 it was held "that a third person may enforce a contract made for his benefit even though the benefit of the parties was the main purpose of the contract."

POINT V

Appellants filed counter claim at the admitted conclusion of their direct testimony (R 124, L 26) asking for special or punitive damages for under payment by Home

Benefit Savings and Loan of Salt Lake City on December 16, 1958.

The court in its finding that appellants were not under paid had an opportunity to hear all testimony concerned on such matter which testimony included the appellants who admitted

1. That they were builders of some experience who had closed at least thirty loans within the last ten years (R 170, L 4-8)

2. That Mr. John Wallen established a construction loan with the First Security Bank in Brigham City, Utah for construction of the home and that appellants were drawing all their money from Mr. Wallen (R 166, L 1-2)

3. That at the time of closing the final loan at Home Benefit Savings and Loan in Salt Lake City that appellants had relied upon the figures given to them by the First Security Bank of Brigham City, to-wit:

(Page 166 of Record: Commencing line 8)

- A. Therefore when we arrived at the Home Benefit we took the figures that was presented that that what was drawn. So the First Security Bank gave them to us and they were taking care of the draws and handing them to us.
- Q. The First Security Bank gave you the figures for the closing ?
- A. Yes, but we weren't aware that they had previously drawn \$1,500.00. We took Mr. Nelson's word, who said that this \$500.00 when we closed that day, this takes care of all the draft of \$12,000.00 and we figured that we had used it.

Q. This conversation with Mr. Nelson, was that in the bank?

A. Surely.

and further the appellants had information from Mr. Leo Nelson of the First Security Bank of Brigham City that "he (Mr. Nelson) had the \$12,000.00 account, and he stated many times before we closed out there was only \$500.00 due, which would take care of the account that was left with Briggs, and he wouldn't allow Wallens to draw on it, or us, until we had settled with Briggs." (R 169, L 25-59)

The appellants further allege that they relied upon respondent Mr. Webber to protect their interest but that they went to Home Benefit Savings and Loan without Mr. Webber and that Home Benefit requested Mr. Webber's attendance. (R 137, L30; R 138, L 1-8)

Further the appellants had closed out many loans and understood all costs concerned and that all charges charged against the appellants were charged at their own approval and with their knowledge. (R 138, L 27-30; R 139 L 1-3; R 34, L 22-30; R 35, L 1, 2)

The appellants admit that \$12,173.81 was paid to the First Security Bank of Brigham City (R 139 L 29-30; R 140, L 1-2) and that the Bank in Brigham City prior to the closing informed them that \$12,000.00 was drawn there and supplied them the information as to such payment (supra).

Plaintiff Exhibit #7 clearly indicates that the Plaintiffs and respondents herein received nothing upon the closing of the loan at Home Benefit Savings and Loan and that there was apparently full disclosure of all facts.

Appellants further appeared to have understood that the \$875.00 or market discount must be paid by someone other than the buyer under a V.A. regulation because they have closed out other loans as the seller and paid this expense (R 171, L 11-14) and that the Veterans Administration required appellants to assume such discount costs before the V.A. would give any loan to the buyer Wallen (R 171, L 26-27).

Appellants further testified that they received additional money from the buyer Wallen which was not counted in their claim for loss (R 178, L 24-30).

The court further found that respondent Webber breached a fiduciary duty in not informing the appellants that he received a payment for sale of the prefabricated package to appellants, and that the appellants purchased said package but that this was the only breach of any duty (Findings of Fact paragraph 4), and that there was no breach of any duty at the time of closing and that Mr. Webber was not grossly negligent nor did he engage in any willful misconduct toward defendants at the time of closing (Findings of Fact paragraph 5), and that where the court does not find such gross negligence or willful misconduct there can be no punitive damage (67 ALR 2 952) nor is such a finding tantamount to a finding of negligence. Such finding must specifically found and proved. And further the appellants on appeal cannot allege simple negligence when such was not pleaded in the trial court (Huber v Deep Creek Irrigation Co. 305 Pac 2d 478 6 Utah 2d 15).

Appellants allege that the respondents had a duty to protect the respondents during the closing of the transaction (Appellants Brief, P. 21) and that respondents

had information available to them of such a character as to advise appellants of money spent or to be spent (Appellants Brief P. 21) when by appellants own testimony they had their own books, figures and information at such closing (R 178, L 10-18) which information was not in the hands of the respondents.

There is no showing that the appellants relied upon the respondents to close this transaction, but that the matter was being handled by the Home Benefit Savings and Loan and that the appellants were not persons unfamiliar with closing costs, and further that appellants were not inept or lacking in business acumen with respect to business affairs as found in the case of *Reese v Harper* (329 Pac 2d 410, 412).

A broker and a real estate salesman are bound to use and to exercise reasonable care and skill, the same as is ordinarily possessed and used by others or persons employed in similar undertakings, that is the broker or salesman will exercise his good faith and loyalty and use such skills as are necessary to accomplish the object of his employment (8 Am. Jur. Broker, Sec. 85), which employment objective was testified to by Mr. Thompson and Mr. Packer to be that a buyer was to be provided them for the purchase of the package home to be completed by them.

A broker's duty is that of a negotiator and it is not incumbent for him to direct or to advise as to terms of a contract or to explain or construe words or terms used in a contract of sale. (8 Am. Jur. Brokers, Sec. 85).

In the capacity of a broker such broker has no authority to close or to sign any contract in the name of

the seller of any property unless specifically authorized to do so clearly and definitely by the terms of the agreement between the broker and seller. (8 Am. Jur. Broker, Sec. 61; 17 L.R.A. (N.S.) (210).

It is not incumbent upon a broker to act as legal council for sellers or buyers of property or to discover possible mistakes or errors in closing papers when there is no actual authority or apparent authority vested in such broker to close such transaction for the seller. (Northwest Poultry & Dairy Products Co. v A. C. Furry Co. 427 Wash. 2d, 35, 176 Pac. 2d 324). Particularly there is no duty on a broker to act as legal council to direct or advise when the sellers have an equal opportunity with the broker to protect their own interests, in that all information which is at hand and is open equally to all parties, which in this case was the simple fact. (Slaughter v Gerson 80 U. S. 379, 383) In such cases the doctrine of Caveat Emptor applies with full force and effect, where no concealment is attempted and the means of obtaining information is open to both parties to such transaction. The seller or buyer must look to the title papers under which he takes and is charged with all facts that appear on their face or to knowledge or which anything there appearing would conduct him. He has no right to shut his eyes or ears to the inlet of information and then say he has no notice or knowledge. Constructive notice is the same in effect as actual notice. (Coal Co. v Doren 142 U.S. 417; Northern Pacific R.R. Co 21 Wash. 320, 55 Pac. 210) There is no testimony that Mr. Thompson and/or Mr. Packer in any way relied upon Mr. Webber at the time of closing or the accepting of any money then due to them.

Appellants further indicated that they did not look to respondents to satisfy any alleged loss, if such a loss was sustained, because by their action of filing a new suit in the Third District Court of Salt Lake County against Mr. John Wallen for the recovery of the same claim as alleged herein they admit that if any money is owed to the appellants it is owed by John Wallen and not by respondents (R 231, L 28-30; R 232, L 1-24).

CONCLUSION

The court is entitled to consider all the evidence and draw therefrom all reasonable and proper inferences, even though another inference equally reasonable might also be drawn (Main Realty Co. v Blackstone Valley Gas and Elec. Co. 59 RI 29, 193 A. 879, and 112 ALR 744). Testimony uncontradicted by direct evidence does not compel the finding in accordance therewith, (Roberts v Roberts, 168 Cal 307, 142 Pac 1080, and 31 ALR 707) since its credibility may be impeached by the interest of the witness and the improbability of his evidence. (53 Am. Jur. 798) Wherefore the judgment as rendered by the trial court should be affirmed and the appeal of the appellants be dismissed both upon the facts and law as presented and upon the further fact that this Court has no jurisdiction to hear or determine this matter.

Respectfully submitted,

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