1983

Golden Key Realty, Inc. And W. Peter Brandley v. P.J. Mantas : Brief of Respondents

IN THE SUPREME COURT

OF THE

STATE OF UTAH

GOLDEN KEY REALTY, INC. and W. PETER BRANDLEY,	)	
Plaintiffs-Respondents,	)	
vs.	)	Case No. 19083
P. J. MANTAS,	)	
Defendant-Appellant.	)	

BRIEF OF RESPONDENTS

An appeal from a judgment of the
Third District Court of Salt Lake County
the Hon. Scott Daniels, Judge

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TABLE OF CONTENTS

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BRIEF OF RESPONDENTS

STATEMENT OF THE KIND OF CASE

This is an action by a real estate broker to recover a real estate commission.

DISPOSITION IN THE LOWER COURT

The case was tried to a jury on a special interrogatory verdict. The jury in answering the special interrogatories found that the broker had used reasonable efforts in selling the subject property, but found that there had been an accord and satisfaction wherein the broker had agreed to accept a reduction in his commission. Notwithstanding the special verdict, the Court, upon motion of respondent, granted judgment for the full commission. The trial court refused, however, to

award respondent costs, prejudgment interest, or attorney's fees.

RELIEF SOUGHT ON APPEAL

Respondent has cross appealed seeking costs, interest and attorney's fees. Respondent seeks to have the judgment of the trial court affirmed, subject to a modification for the addition of interest and attorney's fees.

STATEMENT OF FACTS

Appellant's Statement of Facts fails in total to comply with Rule 75(p), Utah Rules of Civil Procedure[1]. For this reason, respondents desire to restate the facts in a proper and accurate manner.

Respondent, Golden Key Realty, Inc., is a Utah corporation engaged in the business of selling real estate. Respondent, W. Peter Brandley, is a licensed real estate broker of eleven years, licensed for himself and for Golden Key Realty (R-2,8,254). (Hereafter, respondents will jointly be referred to as "Brandley").

Appellant Mantas was the owner of real property at 7774 West 2400 South in Salt Lake County, where he operated a used truck and used truck parts business (R-145). Mantas became acquainted with Brandley as a result of a sale of property that

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1 Rule 75(p)(2)(2)(d), Utah Rules of Civil Procedure provides that the appellant's brief shall contain a concise statement of the material facts of case citing pages of the record supporting such statement. Appellant's brief makes no citation at all to the record.

Brandley had made from Mantas' brother's estate (R-146). As a result of that transaction, Mantas asked Brandley if he would sell Mantas' business property (R-146). This request ultimately resulted in the execution of a standard real estate listing agreement (R-146). The listing agreement required the broker to use reasonable efforts to find a purchaser; established a listing price of $330,000.00; and obligated the owner to pay a 6% commission if the property were sold within the six month listing period (Exhibit P-1).

After obtaining the listing, Brandley made efforts to sell the property. These efforts consisted of listing the property on the multiple listing exchange, having the effect of making the property known to approximately 2500 real estate brokers (R-255); sending approximately 800 letters to prospective business purchasers in Salt Lake, Provo, Ogden, Los Angeles, San Francisco and Phoenix (R-255,256,257); advertising the property in the Wall Street Journal and local papers (R-257); and contacting other brokers (R-235). These efforts resulted in the obtaining of several offers, none of which ever closed because they were either unacceptable to the owner, or because the buyer couldn't qualify for financing (R-91,257).

During the period of time that the listing was in effect, Mantas sold the property to a Mr. Lan England for $300,000.00 (R-147). Mantas bypassed the broker in making this sale and claimed that England was not a buyer that had been found as a

result of the broker's efforts.

After the sale to Lan England, Brandley demanded payment his commission. Two oral conversations took place where this subject was discussed. The first was a conversation at Mantas' place of business wherein Mantas claimed that Brandley agreed to accept $5,000.00 to satisfy the commission claim (R-179); Brandley denied that any such agreement was made, but testified that various figures were "batted around" and the parties agreed to meet the next day at Dee's Family Restaurant and try to finalize an agreement (R-259). The parties did in fact meet the following day at Dee's Restaurant and the following is Mantas' version of the conversation that took place (R-193):

Q. (By Mr. West): But, in any event, there was some conversation about settlement and -- was the meeting by agreement the next day?

A. (By Mr. Mantas): Yes, sir.

Q. And then, what? You came over to Dee's cafe and met?

A. We agreed on the price --

Q. Well, did you meet at Dee's?

A. Yes, sir.

Q. Did you have breakfast together there or something.

A. No, sir, we just stopped in and had a drink and --

Q. How long did that whole conversation take place while you were there at Dee's Family Restaurant?

A. Probably half an hour.

Q. So you sat there in -- did you sit down at a booth?

A. Yes.

Q. And you sat a half hour and talked about some way of resolving the settlement, is that right?

A. Yes, for his money.

Q. Now, that was the time when you handed him a check for $2,500, was it not?

A. Yes.

Q. And you had written something on the back of the check, something about being --

A. Balance due. I wrote a small contract between myself and him.

Q. You wrote that on the back of the check?

A. Yes, sir.

Q. Now, isn't it true that at that time, that right there in Dee's cafe, he said to you, Mr. Mantas, I don't think that this is fair?

A. After he took the check and had the check in his hand.

Q. Then he says, I don't think this is fair. Is that we he said?

A. He said words -- something like, I don't think this is fair. I don't recollect exactly the words, but he says, I will have to see an attorney about it.

Q. Yes, he said something to the substance and effect that, I don't think this is fair and I'm going to see my attorney about it?

A. After he had the check in his hand.

Q. After you handed him the piece of paper, the check?

A. He read the back of the check.

Q. And he took the check and said, I don't think it's fair, I'm going to go see my attorney about it? Is that what happened?

A. The best I recollect, yes. He took the check from my hand. I says, Here it is, there's a small contract. He also stated at the time -- he was assured that he would get the balance of his $5,000 agreed upon and I told him that on the back of the check I wrote a little contract binding it. I says I have also taken a picture of the check.

Q. That's what you wrote on the check?

A. Yes, sir.

Q. And you handed him the check when he made this comment about not thinking this was fair and he wanted to go see his attorney?

MR. HALL: I object. I've let this go on quite a bit and --

MR. WEST: I think the evidence is in and I won't pursue any further, counsel.

Q. (By Mr. West) Then after that, the check was given back to you, was it not?

A. The check was mailed back to me.

Q. The check has never to this day ever been cashed?

A. No, sir.

Q. And there's never been any tender by you of any $5,000 or any other amount other than the check that you gave him?

MR. HALL: Your Honor, I don't believe the witness can respond adequately to the legal term "tender".

Q. (By Mr. West) I'm not using the legal term of tender.

You have never given him any other checks other than that one $2,500 check that was returned?

A. No, I never gave him any other check, no, sir.

(The check referred to above was introduced in evidence as Exhibit P-6).

Brandley's version of what took place at Dee's Family Restaurant was substantially similar to Mantas' testimony. Brandley testifed as follows (R-260):

Q. (By Mr. West) Would you state what you said and what Mr. Mantas said when you had the conversation down at Dee's Family Restaurant.

A. (By Mr. Brandley) Well, Mr. Mantas mentioned this $5,000 and I told him I didn't think that was enough. Then he said, Well, that's all you're going to get. Then he gave me this check for $2,500, $2,500 to come in 90 days. I said, Pete, I don't like this, I'm going to take this to my attorney.

Q. Was there any more said in the conversation?

A. No.

Q. And then you left and he left.

A. That's right.

Based upon the above, the jury in its special interrogatory verdict found that there had been an accord and satisfaction (R-38).

The Court thereafter entered judgment on the verdict (R-91). Brandley moved to alter and amend the judgment, seeking the full commission, interest, costs and attorney's fees (R-88).[2] Judge Daniels granted the motion in part, holding in effect that there cannot as a matter of law be an oral modification of a contract required by the statute of frauds to be in writing (R-105). Brandley was awarded judgment of $18,000, being 6% of the sale price of the property (R-105). The trial judge refused to make an award to Brandley of prejudgment interest, attorney's fees or costs (R-105).

ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY AWARDED THE BROKER JUDGMENT FOR HIS FULL COMMISSION

A. There Can Be No Oral Modification of a Contract Required by the Statute of Frauds to be in Writing.

It was undisputed in this action that the property was sold during the listing period. Utah law is clearly to the effect that a broker is entitled to a commission where the property

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[2] Brandley had previously made a motion for a directed verdict based upon the statute of frauds and other grounds. The reporter's transcript, however, contains nothing beyond the testimony of the witnesses and is not complete. The motion for directed verdict was denied at that time.

sold by the owner during the listing period. Cheney v. Rucker, 14 Utah 2d 205, 351 P.2d 86 (1963); Strout v. Broderick, 522 P.2d 144 (Utah 1974); Taylor National, Inc. v. Jensen Brothers Construction Company, 641 P.2d 150 (Utah 1982).

It is also clear that any agreement authorizing or employing a broker to sell real estate is required by the statute of frauds to be in writing.[3] This being so, it follows that there can be no oral modification of a written agreement required by the statue of frauds to be in writing. Strevell Paterson v. Francis, 646 P.2d 741 (Utah 1982); Zions Properties v. Holt, 538 P.2d 1319 (Utah 1975); Coombs v. Ouzounian, 24 Utah 2d 39, 465 P.2d 356 (1970); Combined Metals v. Bastian, 71 Utah 535, 267 Pac. 1020 (1928). The most recent pronouncement of this basic legal principle was made only last year in Strevell Paterson v. Francis, supra, and was concurred in by all member of the present court. There it was stated:

> "By the same token, the release or revocation of an agreement to answer for the debt of another must also be in writing. It is well settled that if an original agreement is within the Statute of Frauds, any subsequent agreement which alters or amends it must also satisfy the requirements of the statute. (Authorities cited). The alleged oral release obviously does not meet those requirements of enforcibility. Neither does defendant allege or prove any acts done in reliance on or as part performance of the oral release that would remove it from the operation of the statute. Therefore, the existence or nonexistence of an oral release does not constitute a genuine issue of material fact, and the trial court correctly held that plaintiff was entitled to judgment on this issue as a matter of law".

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[3] §25-5-4(5), Utah Code Annotated.

The language of Strevell-Paterson specifically refers to releases, revocations, alterations or amendments of a written contract. Combined Metals v. Bastian, supra, also includes the term modification. To say that an accord and satisfaction does not involve a release, revocation, or modification of an existing contract is to ignore the very definition of that term An accord and satisfaction is an agreement between two persons, one of whom has a right against the other, that the latter should do or give, and the former accept, something in satisfaction of the right of action different from, and usually less than, what might be legally enforced. BLACK'S LAW DICTIONARY 4th Edition, 1951. In other words, there must be an original contract to be revoked, released or modified before there can even be an accord and satisfaction. Furthermore, there is no logical reason why an accord and satisfaction should be exempted from the operation of the rule. The very purpose of the Statute of Frauds is to prevent unfounded and fraudulent claims. Williston on Contracts, 3rd Edition, §448. If there were ever a case where the Statute of Frauds ought to apply it is a case like the instant case where the oral agreement is denied by the party to be charged, and the evidence in support thereof was at best suspicious.

B. There Was No Accord and Satisfaction In This Case.

Appellant has argued that an accord and satisfaction operates as a new agreement and for some unexplained reason

should be exempt from the operation of the rule requiring modification of Statute of Fraud contracts to be writing. But even appellant concedes that the rule would apply if there were no accord and satisfaction.

The trial judge in the instant case used the language accord and satisfaction in his instructions to the jury and in the jury verdict form. Although this terminology was used, the undisputed evidence supports the conclusion that there was never technically an accord and satisfaction, but only an accord if appellant's evidence is believed.[4] The rule is universally accepted (except where the new agreement itself is accepted as a satisfaction) that a mere executory accord, without satisfaction, constitute no bar to the enforcement of the original claim. 1 AM. JUR.2d, Accord and Satisfaction, §47. Under the facts of the instant case, the alleged promise itself to accept a lesser sum could not have been accepted as a satisfaction.[5] The evidence was undisputed that the full $5,000 which Mantas claimed that the broker agreed to accept was never paid or tendered. Thus, there was never any completed accord and satisfaction, and appellant's entire argument fails.

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[4] See Cannon v. Stevens School of Business, Inc., 560 P.2d 1383 (Utah 1977) explaining that an accord is the agreement and the satisfaction is the execution or performance of such agreement.

[5] See §419 Restatement of Contracts stating in effect that the substituted performance must be of a different nature (that is something other than payment in cash) in order for the promise itself to be a satisfaction.

C. None Of Appellant's Authorities Are In Point.

None of the authorities cited by appellant supports the conclusion that the trial court committed error. Four Utah cases are cited in appellant's brief. These cases discuss generally the legal principles of accord and satisfaction, but none of the cases discuss the Statute of Frauds, nor do any of them involve contracts required by the Statute of Frauds to be in writing. None of the Utah cases are in point.

Appellant cites as his strongest authority the case of Gaido v. Tysdal, 235 P.2d 741 (Wyo. 1951). Gaido involved the parol discharge of a contract for the sale of land. The case is readily distinguishable in that Gaido performed to the letter and in full his obligation under the oral agreement of the parties, and the vendor had sold the land to another. The Court correctly noted that the Statute of Frauds has no application where there has been full and complete performance of the contract by one of the contracting parties. The language and authority in Gaido to the effect that written contracts within the Statute of Frauds may be the subject of an oral accord and satisfaction is really nothing more than an application of the doctrine of part performance. Gaido is not substantially different from Cutright v. Union Savings & Investment Company, 33 Utah 486, 94 Pac. 984 (1908) where the Utah court reached a similar decision in connection with an oral rescission of a contract for the sale of land. But the Utah Court in Cutright

carefully noted in its decision that if the parol agreement is wholly executory, it is within the Statute of Frauds and could not be enforced any more than any other oral agreement concerning an interest in real estate. These authorities clearly support repondents' position that an executory promise to pay a lesser amount is still within the Statute of Frauds.

D. There Was No Consideration For an Accord and Satisfaction

It was undisputed in this case that the alleged accord agreement took place after Mantas sold the property and was already indebted to the broker for an $18,000 real estate commission. In Sugarhouse Finance Company v. Anderon, 610 P.2d 1369 (Utah 1980), the Court stated:

> "Where, however, the underlying claim is liquidated and certain as to amount, separate consideration must be found to support the accord; otherwise, the obligor binds himself to nothing he was not already obligated to do, and the obligees promise to accept a substitue performance is unenforceable".

While it is true that settlement of a disputed claim may constitute sufficient consideration[6], it is difficult to determine from the facts of this case any legitimate good faith dispute. Mantas claimed that Brandley was not entitled to a commission because he failed to use reasonable efforts to sell the property. Yet the uncontradicted testimony presented at trial showed that the efforts of Brandley were very substantial. Under these circumstances, the Court could easily find as a

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[6] Cannon v. Stevens School of Business, Inc., 560 P.2d 1383 (Utah 1977).

matter of law that the alleged accord and satisfaction agreement lacked consideration.

E. There Has Been No Part Performance To Take the Case Out of The Statute of Frauds.

Appellant's evidence was to the effect that he handed the broker a check for $2,500 representing one-half of the alleged agreed upon amount; that the broker took it saying that he did not think this amount was fair and that he was going to see his attorney about it; and that the check was thereafter returned, uncashed, by the broker's attorney. These facts were not in dispute, and it is respondents' position that they cannot as a matter of law constitute a basis for part performance.

§30A-3-802, Utah Code Annotated (Uniform Comercial Code) provides in effect that the mere giving of a check (unless a bank is the drawer of the check) does not discharge the obligation for which it is given, but merely suspends the obligation until the check is honored. Thus, by statute, the uncashed check cannot be considered as payment.[7]

Moreover, aside from the Uniform Commercial Code, it is clear that the mere taking physical possession of a check does not constitute payment of the debt where the creditor does nothing indicating his intention to receive the check as

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7 In addition, there was no evidence presented at trial that the check would be good. Inasmuch as payment is an affirmative defense, it would seem that there was a failure on the part of respondent to meet his burden of proof.

payment.[8] This would be true whether or not the check was returned, but in the instant case the check was returned. To say that the broker accepted the check as payment, is to ignore the undisputed evidence.

But even if the Court were to ignore the Uniform Commercial Code, and ignore the common law of payment, the appellant still couldn't prevail because payment alone is not generally considered sufficient to take a case out of the Statute of Frauds. The general law covering this subject is summarized at 73 AM. JUR. 2d, Statute of Frauds, §463, where it is stated:

> "The courts of most jurisdictions hold that the mere payment of a portion of the purchase money, unacompanied by any other act or exceptional circumstance, does not amount to part performance of an oral land contract sufficient to take the case out of the Statute of Frauds ... Accordingly, it is now the general rule in most jurisidictions that the mere payment of the purchase money by the purchaser of land, without other acts, is not sufficient as an act of part performance ... The reason often given for the rule that payment alone is not sufficient is that the plaintiff is considered as having a sufficient remedy at law to recover back the money, it being considered that since he has performed in no respect other than the payment of money, there is a definite and certain standard for estimating his damages ... The rule has sometimes been stated that payment of the consideration without more, is not a sufficient part performance, where its recovery in an action at law would fully indemnify the purchaser".

Thus, to constitute part performance, there must be payment coupled with something else such as taking possession, putting in improvements or some similar action. Most of the cases and

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[8] 60 AM. JUR. 2d, Payment, §46.

authorities on this subject deal with contracts for the sale land, but the same principles would apply to other contracts required by the Statute of Frauds to be in writing.

POINT II

THERE IS NO LEGITIMATE ISSUE REGARDING QUESTIONS TAKEN FROM THE JURY

Appellant claims at Point II of his brief that the trial court committed error in refusing to instruct the jury on issues of fraud, conspiracy or breach of fiduciary duty. There are no references to any part of the record as to what facts are being claimed, and no specific facts are documented or even alleged. It is improper to make blanket assertions and then leave it to court, or to the respondents, to ferret out evidence from the record in support of or in opposition to said assertions. Lake Shore Motor Coach Lines, Inc. v. Bennett, 8 Utah 2d 293, 333 P.2d 1061 (1959). The sufficiency or insufficiency of evidence to support a ruling by the trial court should not be considered on appeal in the absence of references to the record and transcript as to where the testimony can be found. Adamson v. Brockbank, 112 Utah 52, 185 P.2d 264 (1947).

In the absence of anything more than appellant's sweeping statements, respondents cannot consider appellant's Point II as a legitimate issue on appeal.

POINT III

THE TRIAL COURT ERRED IN FAILING TO AWARD RESPONDENTS PREJUDGMENT INTEREST, ATTORNEY'S FEES AND COSTS

Respondents have cross-appealed and claim that the trial

court erred in not awarding prejudgment interest, attorney's fees and costs. These three items will be considered separately.

A. Interest. §15-1-1, Utah Code Annotated, as amended provides that the legal rate of interest on the forebearance of any money, goods or things in action shall be 10% per annum. Prejudgment interest is recoverable in any action where the loss is fixed as of a particular time and the loss can be calculated with mathematical accuracy. Jorgensen v. John Clay & Company, 660 P.2d 229 (Utah 1983); Anderson v. State Farm Fire and Casualty Company, 583 P.2d 101 (Utah 1978).

Respondent is unaware of any case which leaves it up to the trial court as to whether to award or not to award prejudgment interest. Indeed, it has been stated to the contrary in Lignell v. Berg, 593 P.2d 800 (Utah 1979) as follows:

> "In contract cases, certainly, interest on amounts found to be due in judicial proceedings is recovery to which the creditor is entitled as a matter of law".

See also Anderson v. State Farm Fire and Casualty Company, supra, where the refusal to award prejudgment interest was part of the basis for a reversal. This is not a matter that is discretionary with the trial court and respondents are clearly entitled to an award of prejudgment interest.

B. Attorney's Fees. The listing agreement, which was the subject of this action, provided as follows (Exhibit P-1):

> "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".

Respondents presented evidence, which was unchallenged, that reasonable attorney's fees had been incurred in the amo of $3,220.00[9]. In spite of the contract between the parties, and the undisputed evidence before the Court, the trial judge refused to award attorney's fees.

In Utah, attorney's fees are recoverable when provided f by statute or contract. Biesinger v. Behunin, 584 P.2d 801 (Utah 1978); Stubbs v. Hemmert, 567 P.2d 168 (Utah 1977). The amount of attorney's fees to be awarded a prevailing party is generally within the sound discretion of the trial court. Turtle Management Inc. v. Haggis Management, 645 P.2d 667 (Uta 1982). However, it is clearly an abuse of discretion to award nothing, where the contract for the payment of fees and the reasonable amount thereof are not in dispute. Respondents are entitled to an award of attorney's fees.

C. Attorney's Fees on Appeal. Not only are respondents entitled to attorney's fees incurred in the court below, they are also entitled to an additional award of attorney's fees fo the appeal. Early Utah cases held that attorney's fees on appeal were discretionary with the Appellate Court. The earl decisions were expressly overruled in the recent case of Management Services v. Development Associates, 617 P.2d 406 (Utah 1980) where the Court state as follows:

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9 See Supplemental Stipulated Record.

"The parties here agree to pay reasonable attorney's fees if it became necessary to enforce the contract. If plaintiff is required to defend its position on appeal at its own expense, plaintiff's rights under the contract are thereby diminished. We therefore adopt the rule of law that a provision for payment of attorney's fees in a contract includes attorney's fees incurred by the prevailing party on appeal as well as at trial, if the action is brought to enforce the contract, and overrule Swain and Downey State Bank on this point insofar as they may be to the contrary".

See also Centurian Corporation v. Cripps, 624 P.2d 706 (Utah 1981).

D. Costs. Rule 54(d)(1), Utah Rules of Civil Procedure provides that costs shall be awarded as of course to the prevailing party unless the Court otherwise directs. Although this rule leaves room for discretion in the trial court, it does not address the issue of awarding costs where the parties have a written contract covering this item. It would seem that the very same arguments that the Court raised in Management Services v. Development Associates, supra, to allow attorney's fees on appeal as a matter of right where the payment of attorney's fees is a subject of contract would equally apply to a contractual provision covering the payment of costs. The appellant in his written listing agreement agreed to pay both attorney's fees and costs. Respondents are therefore entitled to be awarded the costs.

CONCLUSION

Based upon all of the arguments and authorities as cited herein, it is respectfully urged that the judgment of the trial

court be affirmed insofar as it relates to the principal amount of the judgment.

Upon remand, however, the trial court should be directed in accordance with respondents' cross-appeal to modify the judgment by including therein an award for interest, attorney's fees, attorney's fees on appeal and costs.

Respectfully submitted,

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