

1964

Estella D. Wilkerson v. Woodrow W. Stevens and Ketchum Realty Co. : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

ESTELLA D. WILKERSON, now ES-
TELLA D. WILKERSON MURATET,
Plaintiff and Appellant,

vs.

Case No.
10183

WOODROW W. STEVENS and KET-
CHUM REALTY COMPANY, A Utah
Corporation,
Defendant and Respondent.

APPELLANT'S BRIEF

Appeal from Judgment in favor of Defendant KET-
CHUM REALTY COMPANY, a Utah Corporation,
dismissing Plaintiff's complaint with Prejudice, at Pre-
Trial May 29, 1964. Appeal from Judgment entered in
Third Judicial District Court, Salt Lake City, Utah
Honorable A. H. Ellett, Judge

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Corporation,
Defendant and Respondent.

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APPELLANT'S BRIEF

STATEMENT OF KIND OF CASE

Plaintiff owned a small home in Magna, Utah, and had listed it for sale with Gaddis Investment Company, some years ago. Defendant Stevens, at that time was licensed salesman for Gaddis.

He procured a buyer, and all necessary papers were signed, and the Buyer paid Gaddis all payments till their commission was paid.

That Buyer abandoned the contract.

In the meantime Defendant Stevens had left "GADDIS" and was a licensed salesman under Defendant KETCHUM REALTY COMPANY.

Defendant Stevens contacted Plaintiff and represented he could find a Buyer. Plaintiff has no record

of "LISTING" being signed, but her recollection is that Stevens brought various papers, and a blank real estate contract, all of which were signed and given Stevens.

That Stevens, on July 12, 1961 filled in the uniform real estate contract, had the Buyer Vallejos and wife sign, and kept the contract copy of Plaintiff.

Since Plaintiff had no money to pay commission, and back taxes, it was agreed that Vallejos pay Stevens \$100.00 down payment and \$50.00 per month and \$18.32 as Vallejos share of 1961 taxes, such payment to be made to Stevens till commission, 1960 and 1961 taxes paid. After that Vallejos was to pay to Plaintiff. Stevens was to report payments received and disbursements to Plaintiff.

This was an oral agreement.

Under this agreement Vallejos paid Stevens \$100.00 down payment, \$18.32 toward 1961 taxes, and fifty dollars per month, till a total of \$468.32 was paid Stevens.

Plaintiff became worried and tried to contact Stevens and learned he had moved to Hawaii. Letters and telegrams brought no response. Vallejos did not get back his payment book after last payment.

Extended effort by Plaintiff to obtain accounting and papers got no result.

This suit followed.

Stevens filed an answer constituting general denial, but made no other appearance. Default was taken as to him.

The Defendant "KETCHUM" moved for summary judgment, which was heard by Judge Jeppson, taken under advisement, memorandum of authorities submitted, and finally Judge Jeppson denied the motion.

The matter came before Judge Ellett on May 29, 1964, for pre-trial. After hearing counsel for Plaintiff and "KETCHUM" Judge Ellett gave judgment of dismissal with prejudice.

The facts apparently are not in dispute. Ketchum Realty Company was a licensed real estate broker. At the time involved Stevens was a licensed real estate salesman, licensed under application of Ketchum Realty Company.

There seems no dispute the money was paid to Stevens as claimed, that he pocketed the money, and never paid taxes. Plaintiff is unable to establish that "KETCHUM" had notice of any of these dealings.

The whole issue of the case, is whether a real estate broker is bound by the acts of its salesman, with or without knowledge assuming there is no collusion between salesman and customer.

Stevens received \$468.32. He pocketed the money. He took off for Hawaii. He was licensed to sell real estate under broker Ketchum Realty Company.

Does the policy of this Court permit the Broker to be relieved of its responsibility, assuming it had no knowledge of the entire transaction?

The foregoing is intended to cover "STATEMENT OF KIND OF CASE"; "DISPOSITION IN LOWER COURT"; and "STATEMENT OF FACT."

There is no dispute as to facts, there was no trial, no testimony. The case was disposed of at pre-trial.

ARGUMENT

A reading of the Statute relating to Brokers and real estate salesman, 61-2, Utah Code Annotated 1953, clearly establishes the intent of the legislature to hold the Broker responsible for selecting dependable and qualified agents as salesmen.

The salesman cannot operate unless working through a broker. The regulations and controls are largely over the Broker, the salesman is not even required to furnish bond to obtain a salesmans license.

The memorandum of authorities furnished Judge Jeppson, goes into extended detail as to Plaintiffs position.

YOUNG VS. BUCHANAN — 123 Utah 369 — 259 Pacific 876, is authority for the position that a salesman can act ONLY thru broker, and for a salesman to act on their own is in contravention of public policy. The purpose of the Statute (Brokers) "Is to protect the public from fraud."

In that case, as here, the broker signed an application certifying that a salesman is honest, truthful and of good reputation.

Judge Henroid in a separate opinion said:

“It is clear that were this action brought by a third party against the salesman, (our case) the Broker, whether or not disclosed, and whatever the agreement inter se, **WOULD BE LIABLE FOR THE CONDUCT OF THE SALESMAN.**”

This case cites Restatement of Agency, sections 31 and 39 and comment B. to the effect that a salesman can conduct the Brokers business. That the Broker need not be disclosed to the third party, nor that the name of the Broker appear on any documents executed by the salesman and client.

AMERICAN LAW INSTITUTE — RESTATEMENT OF LAW — SECOND AGENCY — paragraphs 261 at page 570, chapter even, is authority for the proposition that where the principal places his agent in a position to deceive, the principal is liable, even though entirely innocent, and received no benefits.

A. L. REESE VS. THOMAS R. HARPER — 8 Utah second 119 — 329 Pacific Second 410 Supports the proposition that the law demands that the agent be competent and reliable, and be held to a high degree of fiduciary relationship with client.

WILLIAM F. SMITH VS. CARROL REALTY CO. — 8 Utah Second 356 — 335 Pacific Second 67 stresses the duty of Broker through salesman to client.

HUDSON VS. NIXON — a California case — 370 Pacific second 324 is to the same effect. Also DODGE VS. NATIONAL SURETY COMPANY, 294 Pacific Second 471; and SMITHSON VS. SPARBER — 11 Pacific Second 91.

Idaho seems to hold the same way — DUNCAN BRANNON VS. SMITH FROZEN FOODS OF IDAHO — 365 PACIFIC Second 958; and WHITE VS. DONEY — 351 Pacific Second 380.

The Hudson vs. Nixon case, above, is authority for the proposition that the principal is liable for compensatory damages as well as the minimum statutory damage (\$500.00).

Colorado seems to agree — LESTER VS. MARSHALL — 352 Pacific second 786. Also WALDON VS. KOEHLER — 349 Pacific Second 379.

Washington goes along the same lines — RUSHING VS. STEPHANUS — 393 Pacific Second 281 and BOONSTRA VS. STEVENS — NORTON INC. — 393 Pacific Second 287.

3 C.J.S. para. 231 — page 140 AGENCY goes to the proposition that the principal (Broker) is liable for the agents (salesman) act in spite of fraud, neglect or mistake.

It also supports the proposition that a principal (broker) must stand the loss of his “unworthy” or “faithless” agent (salesman). The Broker selects the sales-

man, and he cannot escape liability by claiming lack of knowledge or setting up a "puppet" to take the blame.

Also — The loss should be on the one responsible for sending out an irresponsible agent, not on the innocent third party.

3 C.J.S. para. 256 — page 190 — Holds the principal is liable for agents injury to third persons, even though there is fraud, on the part of agent, and even though principal receives no benefit, had no knowledge, and agent acted for his own benefit.

12 C.J.S. para 8 (C)(1) page 14 — Indicates that the "BROKER STATUTE" is set up to protect the public. That the Brokers bond covers his own acts as well as his salesman and employees. (Utah requires Brokers bond but none from salesmen.)

ANDERSON VS. JOHNSON — 108 Utah 417 — 160 Pacific Second 725 indicates the Brokers Statute was enacted to provide for regulation of brokers, and to safeguard this public.

ELDER VS. CLAWSON — 14th Utah Second 379 — 384 Pacific Second 802 at page 805 — Judge Crockett said "Plaintiff had the right to assume that he (Real Estate Broker) had both the expertite and the INTEGRITY required to qualify him to serve in that capacity. By reason of this they (client) could repose some confidence in his knowledge and in his HONESTY." said:

“Plaintiff had the right to assume that he (Real Estate Broker) had both the expertise and the INTEGRITY required to qualify him to serve in that capacity. By reason of this they (client) could repose some confidence in his knowledge and in his HONESTY.”

CONCLUSIONS

That Judge Ellett committed error in granting judgment of dismissal with prejudice.

That Plaintiff is entitled to judgment against Defendant KETCHUM REALTY COMPANY as prayed in Plaintiffs' Amended complaint: — towit: —

1. Plaintiff be awarded treble the amount paid Stevens, \$468.32 or \$1,404.96.
2. Interest on \$468.32 from February 15, 1962 to June 9, 1964, when judgment was entered, at six percent; and interest at eight percent on \$1,404.96 from June 9, 1964 till paid, together with her costs.
3. That in addition Plaintiff should be granted judgment for penalty for delinquent taxes, 10.87; travel expense, legal fees for straightening out the mess left, and drawing new contracts between Plaintiff and Vallejos; new title insurance, and other expenses in the sum of \$500.00.
4. Mental distress in the sum of \$10,000.00.
5. Exemplary or punitive damage in the sum of \$10,000.00.

Respectfully submitted,

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