1964

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

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

ESTELLA D. WILKERSON, now ESTELLA D. WILKERSON MURATET,
Plaintiff-Appellant,

vs.

WOODROW W. STEVENS and KETCHUM REALTY COMPANY, a Utah corporation,
Defendant-Respondent.

No. 10183

BRIEF OF RESPONDENT

Appeal from the Judgment of the Third District Court for Salt Lake County Honorable A. H. Ellett, Judge

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BRIEF OF RESPONDENT

STATEMENT OF THE KIND OF CASE

This is an action by plaintiff seeking to recover from Ketchum Realty Company, a real estate broker, as well as from the broker's agent, defendant Woodrow W. Stevens, by reason of defendant Stevens' dealings with plaintiff in his own behalf and without the knowledge of the broker, defendant Ketchum Realty.

DISPOSITION IN LOWER COURT

The trial court awarded defendant Ketchum Realty Company judgment at pretrial dismissing plaintiff's complaint, and also awarded plaintiff judgment against defendant Woodrow W. Stevens. Plaintiff appeals only from the judgment of dismissal as to the defendant Ketchum Realty Company.

STATEMENT OF FACTS

Defendant Woodrow W. Stevens, licensed as a real estate salesman by defendant Ketchum Realty Company, a licensed real estate broker (R. 57), acting strictly in his own behalf and without the knowledge, consent or participation of his principal Ketchum Realty Company (R. 23, 24, 57-59), entered into certain real estate dealings with plaintiff and allegedly misappropriated funds from plaintiff. (R. 7).

Ketchum Realty Company had no knowledge of the transaction, did not sign the listing agreement or any other document, received no commission, and in fact did not know of the acts complained of until the suit herein was filed. (R. 23, 24, 58, 59).

At the time of the transaction, Ketchum Realty's name was not disclosed to plaintiff, nor did plaintiff in any way know of Ketchum Realty, nor did plaintiff rely upon Ketchum Realty. (R. 18, 19, 30, 59, 64).

ARGUMENT

POINT I. A REAL ESTATE SALESMAN ENTERING INTO REAL ESTATE TRANSACTIONS IN HIS OWN BEHALF CANNOT INVOLUNTARILY BIND OR SUBJECT HIS BROKER TO LIABILITY WITH RESPECT TO SAID TRANSACTIONS.

It is basic law that a principal is not liable for the independent acts of his agent done in his own name outside the scope of his authority. 3 C.J.S., Agency, §232 (a), p. 142. A transaction outside the scope of an agent's authority is incapable of affecting the rights and liabilities of the principal and is the agent's act exclusively. 2 C.J.S., Agency, §91, p. 1184.

The above general doctrine is especially true when dealing with real estate agents as they are creatures of statute with limited statutory powers, and therefore closely restricted as to the terms of their agency. They must keep within the bounds of the authority conferred upon them or their principals will not be bound. 12 Am. Jur. 2d Brokers, §67, p. 821.

> "Persons dealing with a known agent cannot hold the principal when the agent acts outside of his authority express or implied, and that is particularly true when the agent is one created by statute with express statutory limitations on his power." *School Dist. No. 9 of Apache Co. v. First National Bank of Holbrook,* 58 Ariz. 86, 118 P.2d 78.

A real estate salesman is a special agent with authority limited to finding a purchaser of property the broker has listed for sale, and persons dealing with him are bound, if they would hold the broker, to ascertain both the fact of the agency and the nature and extent of his authority. *Larson v. Bear*, 38 Wash. 2d 485, 230 P.2d 610. For example, the authority granted to an agent to obtain a buyer for certain realty does not give him authority to enter into a contract for the conveyance of said property. *Peoples National Bank of Washington v. Brown,* 37 Wash. 2d 49, 221 P.2d 530.

The Utah statutes expressly delineate what acts a broker may undertake and what acts his agent-salesman may perform. Section 61-2-2, Utah Code Annotated, 1953, defines a real estate broker as the person who for another and for a fee or consideration sells or lists any real estate. Section 61-2-3, Utah Code Annotated, 1953, defines a real estate salesman as the person employed on behalf of a licensed real estate broker. Section 61-2-10 makes it unlawful for a real estate salesman to accept a commission, except from his broker, for the performance of any act specified by the statute involving real estate transactions and provides that only his employer, who must be a licensed broker, may contract for real estate commissions. Accordingly, this court, in *Young v. Buchanan,* 123 Utah 369, 259 P.2d 876, concludes that a salesman acting in his own behalf with respect to a real estate transaction is operating as an unlicensed broker in controvention of public policy and the statutory mandate, and that a listing agreement

between a salesman in his own behalf and a customer is prohibited by statute, invalid and unenforceable, and that a broker having no knowledge of such agreement has no claim or liability with respect to said agreement. Accord *Miller v. Insurance Company of North America* (Tenn.), 366 S.W. 2d 909, wherein the court held that a real estate agent, acting in a personal capacity, could not subject his broker's surety to a liability for his malfeasance. Accord *Sackett v. Starr,* 95 Cal. App. 2d 128, 212 P.2d 535; *Angus v. London,* 92 Cal. App. 2d 282, 206 P.2d 869, wherein the courts held an agency to negotiate a sale or purchase of realty does not authorize the agent to bind his principal by contract.

Title 24-5-4(5), Utah Code Annotated, 1953, provides that every agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation shall be void unless such agreement or some note or memorandum thereof is in writing *subscribed by the party to be charged therewith.* There is no writing between plaintiff and Ketchum Realty Company. Ketchum Realty Company could not sue plaintiff for a commission. A fortiori, plaintiff cannot make claim against Ketchum Realty by reason of her dealings with defendant Stevens.

> "Under the provisions of 25-5-5(5), contracts of real estate brokers are required to be in writing, and courts cannot enlarge the terms or create new provisions in such contracts. * * * " *Mifflin v. Shiki,* 77 Utah 190, 293 Pac. 1.

This court, in *Malia v. Giles,* 100 Utah 562, 114

P.2d 208, held that under a statute providing that in order to transfer certificates of stock, the signature of the owner must be endorsed thereon or written authority of the agent must accompany the certificate, the absence of the owner's signature or written authority of the agent was a warning to others dealing with an agent to ascertain the extent and limitations of the agency. Accord *Dohrmann Hotel Supply Co v. Beau Brummel, Inc.*, 99 Utah 188, 103 P.2d 650, wherein it was held that one dealing with a supposed agent is bound to ascertain his capacity.

It must here be stated that appellant's brief contains citation after citation claiming support for the alleged doctrine that a principal is liable for his agent's acts despite fraud, neglect or mistake or the agent's faithlessness. No case or authority cited by appellant stands for such a proposition. For example, on page 6, appellant states:

> "3 C.J.S. para. 231, page 140 A G E N C Y goes to the proposition that the principal (Broker) is liable for the agents (salesmen) act in spite of fraud, neglect or mistake."

which quoted statement presumptuously omits that *such acts must be within the scope of the agent's actual or apparent authority* to bind the principal.

POINT II. DEFENDANT STEVENS' ALLEGED ACTS WERE NOT WITHIN THE SCOPE OF HIS ACTUAL OR APPARENT

AUTHORITY, NOR WAS HIS AUTHORITY RELIED UPON BY PLAINTIFF.

It is readily conceded that even though an agent acts outside the scope of his actual authority, a principal may be bound if his own acts or conduct create an apparent authority relied upon by a third person. However:

> "The extent of an agent's apparent authority is not measured by the extent of the power exercised by the agent, but by the principal's conduct with reference to the power exercised by the agent. * * * The principal's conduct which is relied on as indicating that the agent has apparent authority to deal with a third party must be such as occurs prior to dealing with the agent and not subsequent thereto." *Malia v. Giles,* supra.

The facts are undisputed that plaintiff did not know that Stevens was a licensed agent of Ketchum Realty, had no dealings with Ketchum Realty, Ketchum Realty's name was not mentioned and did not appear on any documents, and plaintiff did not rely upon Ketchum Realty Company. (R. 18, 19, 30, 59, 64).

> "One who seeks to charge a principal upon a charge of ostensible authority must himself believe that the agent had authority to do the act in question, and also, an act or negligent omission of the principal must have led the third party to the mistaken belief." *Cignetti v. American Trust Co.,* 139 Cal. App. 2d 744, 294 P.2d 490.
>
> "One who deals with an agent as principal cannot set up the agent's apparent authority on

which he did not rely so as to establish a right against his principal." *Woodward Co-op Elevator Ass'n. v. Johnson, et al,* (Okla. '52), 248 P.2d 1002.

The American Law Institute, Restatement of Agency, §199, provides:

> "Acts Not on Account of Principal.
>
> An undisclosed principal who authorizes an agent to make a particular contract on his account and in his business is not liable upon such contract if the agent makes the very contract authorized but does not intend to act on account of the principal.
>
> *Comment*:
>
> *a.* In the case of the undisclosed principal there is no reliance by the other party upon the fact of agency, and the situation is similar to that in which a servant commits a battery while acting wholly for his own purposes, in which case, as stated in § 235, the master is not liable. In both situations the principal or master is affected only by acts performed because of and arising out of the relationship. The fact that the existence of the agency suggested or created the opportunity for the act is not sufficient. * * * "

POINT III. PLAINTIFF'S JUDGMENT AS TO DEFENDANT STEVENS PREVENTS FURTHER CLAIM AGAINST DEFENDANT KETCHUM REALTY COMPANY.

Where one deals with another believing him to be a principal and subsequently learns that he was dealing

with an agent of an undisclosed principal, he may recover either from the person with whom he dealt or from the undisclosed principal. 3 Am. Jur. 2d, Agency, §308, p. 666. Ketchum Realty cannot be classified as an undisclosed principal as this would require its knowledge and silent participation in the transaction. There are no facts to support this conclusion. However, where an agent and an undisclosed principal are joined in a suit, the plaintiff may not have judgment against both, but must, prior to judgment, elect to hold one or the other. *Costello v. Castler, et al,* 7 Utah 2d 310, 324 P.2d 772. Judgment has been entered for plaintiff against the agent Stevens (R. 65), and plaintiff still seeks to recover from the principal, Ketchum Realty Company.

The American Law Institute, Restatement of Agency, §210, provides:

> "Judgment Against Agent.
>
> (1) An undisclosed principal is discharged from liability upon a contract if, with knowledge of the identity of the principal, the other party recovers judgment against the agent who made the contract.
>
> (2) The principal is not discharged by a recovery of judgment against the agent by the other party before knowledge of the identity of the principal."

CONCLUSION

It is respectfully submitted that the trial court properly dismissed plaintiff's complaint as to defend-

ant Ketchum Realty Company in accordance with the principles contained herein and that said judgment of dismissal should be affirmed.

Respectfully submitted,

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