1965

Estella D. Wilkerson v. Woodrow W. Stevens and Ketchum Realty Co. : Brief of Appellant in Support of Petition for Rehearing

Utah Supreme Court

Roy F. Tygesen; Attorney for Plaintiff and Appellant;
D. M. Draper, Jr.; Attorney for Defendant and Respondent;

IN THE SUPREME COURT
of the
STATE OF UTAH

ESTELLA D. WILKERSON, Now ESTELLA D. WILKERSON MURATET,
Plaintiff and Appellant,

vs.

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

Case No. 10183

APPELLANT'S BRIEF IN SUPPORT OF PETITON FOR REHEARING

Appellant contends that the Court misinterpreted the facts in arriving at its decision, and misapplied the law to the facts. That the case of Costello vs. Kastler on which the present decision is based, does not apply to situations where Broker and salesman are involved, and that the rule as to "undisclosed principal" does not apply in Utah to Brokers and salesmen.

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STATEMENT OF FACTS

Appellant feels that the Court did not give sufficient consideration to these basic facts:

Plaintiff had dealt with Stevens before in the sale of the same property, while he was salesman for Gaddis. This transaction went through without problems. She dealt with him as salesman here, and not as an individual.

Stevens did exactly what Ketchum hired him to do, find and bring together seller and buyer, get papers signed, so as to collect a commission.

At all times Stevens was a licensed real estate salesman working under Ketchum as broker. Ketchum hired him, obtanied his license, and vouched for his integrity.

Paintiff, in good faith, paid Stevens $468.32.

Plaintiff, of all three, was the innocent party.

Stevens admittedly was a thief and a scoundrel, and absconded with the money.

Ketchum hired him, Ketchum vouched for him in obtaining his license, Ketchum made it possible for him to go forth armed with a license, bearing the seal of the great state of Utah, to accomplish his theft or embezzlement.

Plaintiff was certainly the innocent party, who under Judge Ellett's decision, and this Court's decision, was made the victim.

The judgment granted against Stevens is certainly a worthless piece of paper, he is apparently judgment proof and out of this Court's jurisdiction.

Plaintiff has never had her day in Court, the matter having been determined at pre-trial.

The substance of the case so far as justice is concerned is that our Courts say to Brokers, "Hire who you please, we will not hold you responsible, unless the victim can prove you knew all about it." To a real estate salesman, the Court says "We support you in your skullduggery, steal if you can, we will give judgment against you. But if the customer wants to hold your broker, he must 'elect' the broker, and turn you loose."

To the innocent party — "Sorry, you should have been more cautious, and it was your duty in dealing with a licensed salesman, to demand to know his broker, and deal with the broker."

The foregoing is not intended to question the Court's integrity or ability, but an effort on Appellant's attorney to forcefully draw to the Court's attention the unfairness of the ruling.

POINT 1.
THE COURT MISINTERPRETED THE FACTS.

Quoting from the decision, "She took judgment against Stevens, and the lower Court dismissed the action as to Ketchum. The Plaintiff chose to retain her judgment against Stevens, but appealed to this Court, seeking to charge Ketchum also.

The record shows that Stevens filed a general denial September 19, 1963. On February 10, 1964, his attorney Vernon J. Langlois, filed his withdrawal. On May 29, 1964, made a minute entry, as to Stevens "Answer stricken, Pl. given judgment as prayed." The judgment as to Stevens was prepared by Tygesen, and signed by Judge Ellett, June 30, 1964. One month after the judgment was signed as to Ketchum.

The judgment as to Ketchum, dismissing the case, was prepared by Draper, and signed by Judge Ellett June 1, 1964. At the request of Plaintiff, "FINDINGS" were prepared by Draper and signed by Judge Ellett, June 8, 1964.

The pre-trial occurred May 29, 1964. Stevens nor his attorney did not appear. The Court made its ruling

as to Ketchum. Later that day, Judge Ellett, in order to complete the case, made its minute entry as to Stevens.

The disposition as to Ketchum was made first, the one as to Stevens, an afterthought. The decision would infer judgment was first had as to Stevens.

The question of an "ELECTION" was never raised in the lower Court, and the statement in the opinion "Such an election has been made in this case," as a matter of fact never occurred.

No election was ever made by Plaintiff, and the question was never considered in the lower Court, nor did Judge Ellett make his decision on that point.

POINT 2.

THAT PLAINTIFF MADE NO ELECTION IN LOWER COURT.

All during the proceedings, pleadings, memorandums, brief, and argument before this Court, Plaintiff proceeded on the theory that both principal and agent were liable.

All of Defendant Ketchum's pleadings, interrogatories, briefs, "Findings" and "decree" related to the point that Plaintiff did not rely on Ketchum, and Ketchum had no knowledge.

Not once did there appear a demand for an election, nor that an election had been made.

POINT 3.

COSTELLO VS. KASTLER DISTINGUISHABLE.

In the Costello case, the agent was actually a buyer of minerals for processing mill. There was no way

Plaintiff could have known of agency, there was no statute involved.

The Costello case relies heavily on 118 A.L.R. 682, which was a case where the owner transferred his stock on the books to the agent's name. Here there was a clear intent to keep the principal secret. The third party in making an investigation could not have ascertained the principal-agent relation.

In the Costello case, the Court cites LOVE VS. ST. JOSEPH STOCK YARDS, et al, 169 Pacific 951. In that case the agent was acting as agent for Stock yards, but did not reveal principal. The Plaintiff had no way of discovering the principal.

POINT 4.

THAT REAL ESTATE BROKER STATUTE ESTABLISHES PRINCIPAL AND AGENT RELATIONSHIP BETWEEN BROKER AND SALESMAN, AND "UNDISCLOSED PRINCIPAL" DOCTRINE DOES NOT APPLY WHERE REAL ESTATE BROKER AND SALESMAN ARE INVOLVED IN TRANSACTION.

Plaintiff's position is that the point as to "UNDISCLOSED PRINCIPAL" should not apply to any transaction where real estate Broker and real estate salesman are parties, since that statute as to real estate brokers must be read into each of such transactions, and by that statute, principal and agent relationship is established, and there can be no such thing as an undisclosed principal. In our case, there was no effort to conceal from Wilkerson the relationship with Ketchum and Stevens. Had Stevens attempted to conceal the relationship, it

was a public record at the State Capitol, Ketchum's office displayed Stevens' license, every county clerk was furnished a report showing Stevens was agent for Ketchum, and Stevens held a card issued by the State of Utah, with their seal thereon embossed, declaring Stevens was an agent or salesman for Ketchum.

How can the rule of "UNDISCLOSED PRINCIPAL" be involved in view of these facts. It is not possible to have an "undisclosed principal" under Utah Real Estate Broker statute.

Wilkerson certainly dealt with Stevens as a "salesman" even though she never knew about Ketchum. In view of that relationship, then the provisions of the Utah Real estate brokers statute must be read into these proceedings. The whole purpose of that statute is to protect the public, and to hold broker and salesman equally responsible to the public.

61-2-1 provides that it is unlawful to operate without a license.

61-2-5 that Securities commission be given extensive power and control over brokers and salesmen. It requires that brokers vouch for salesmen's integrity, and the broker must furnish bond, to protect the public. The statute does not require a salesman bond. Presumably the legislature intended to hold the broker as the responsible party.

61-2-7 provides that after they are satisfied as to the salesman's qualifications and honesty, that they issue

him a license, with their seal attached, and the broker is given a similar license to be displayed in his office.

61-2-8 provides that if the salesman's employment is terminated, the broker must immediately notify the "Commission," return the license they hold, and the salesman cannot thereafter sell. Nor can a salesman be employed by more than one broker at a time.

61-2-9. To further effect control over brokers and salesmen, this section provides the licenses must be renewed each year. If the broker loses his license, then all salesmen, licensed under him, immediately lose their licenses.

61-2-10 provides that a salesman cannot accept a commission, except from his employer, the broker. Again stressing the control of broker over salesman. This section uses the word "unlawful".

61-2-11 lists grounds for revocation. Included are (4) acting for more than one broker; (5) failing to account for money coming into his possession; (9) failing to furnish all parties with copies of papers drawn; (10) keep records for three years; (11) failure to make full disclosure, including undisclosed principal. (Incidently, Stevens apparently violated every provision.)

61-2-14 requires commission to prepare and mail to all county clerks, semi-annually, a list of brokers and salesmen, and furnish a copy to anyone, on request.

61-2-17 provides for penalties including fine and jail.

61-2-20 says a salesman can fill out all forms, including receipts. If the salesman can issue a receipt, presumably he would be entitled to receive money.

In view of the extended nature of this statute it seems apparent a broker and salesman are one, and the broker by this statute is responsible for his salesman's conduct.

With all the provisions to make public the relation of broker and salesman, it seems inconceivable that the question of "undisclosed principal" can be factually a part of any contract wherein either salesman or broker are parties. It is not possible to conceal the relationship of principal and agent.

In the annotations to 118 A.L.R. 682, at page 684, this appears, "(15) Everyone in a state is bound to know the existence and terms of a general law of the state." The general law is made part of every contract. At page 705, the Court said all parties are charged with knowledge of the statute.

At page 696 the Court said that a principal and agent "constitute but *one* party to the contract."

It is Appellant's contention that there can be no such thing as an "undisclosed principal" under the Utah real estate broker statute, and to so hold, means that the Court must entirely ignore the intent and purpose of the statute.

This Court should properly hold, that there can be no such thing as an "undisclosed principal" as far as broker and salesman are concerned.

POINT 5.

THE RIGHT TO CLAIM AN ELECTION IS WAIVED BY FAILURE TO DEMAND AN ELECTION IN LOWER COURT.

All through this proceeding, Plaintiff proceeded on the theory she could have judgment against both broker and salesman, but limited to one recovery.

Defendant Ketchum in his Answer, interrogatory, memorandum of authorities, argument before Judge Jeppson, and before Judge Ellett at pre-trial, based his entire defense on no knowledge on the part of Ketchum, and no reliance on Ketchum, and agent acted beyond the scope of his authority. In Defendant Ketchum's Answer, "Fourth Defense" he alleges that Ketchum had no knowledge of the deal; that Ketchum did not participate; that Stevens acted in his own behalf; that Stevens acted beyond the scope of his authority.

The Ketchum affidavit in support of motion for summary judgment in paragraph 3, stated that Stevens did not list the transaction with Ketchum, and at 5, that Stevens was acting in his own behalf. Ketchum's "Memorandum" furnished Judge Jeppson, stated that at no time was Ketchum disclosed, discussed, or relied upon. Quoting from that memorandum, first page, "ISSUE"' "Whether or not a principal whose identity is undisclosed and not reiled upon is liable for the acts of its agent not within the scope of his authority and actng in his own behalf."

The memorandum is directed entirely to this issue, and "election" is never mentioned, nor is the Costello case cited.

In the judgment prepared by Draper, the basis is on lack of knowledge by Ketchum, no disclosure, discussion or reliance on Ketchum, and that Stevens acted on his own. There was not one word as to "election". In the "findings" later prepared by Draper at the request of Plaintiff, and signed by Judge Ellett, (2) Stevens acted on his own, without knowledge of Ketchum. (3) At no time was Ketchum disclosed or relied upon by Plaintiff, nor did Ketchum participate in the transaction.

Again, not one word in relation to "election".

The principal of the Costello case as to "election" was first introduced in Ketchum's respondents brief.

Judge Ellett signed the "Findings" and "judgment" as prepared. Presumably they reflect his basis for the decision. There was not one word in either of these documents, suggesting an "election". At no time in all these proceedings was there a discussion, suggestion, request, or demand for an "election".

Plaintiff's Counsel admits ignorance of the Costello case, until it was pointed out in Respondent's brief.

Plaintiff contends that (1) The failure to demand an election in the lower Court, waived that right; and (2) The question of election, cannot be raised for the first time on appeal.

This Court apparently bottoms its decision on *Costello vs. Kastler,* 7 Utah 2nd 310; 324 Pacific 2nd 772, which in turn, relies heavily on 118 A.L.R. 682.

Appellant draws the Court's attention to these points from those two cases:

In the Costello case at page 773, the Court said, "Ordinariy Plaintiff would not be entitled to judgment against both. However, Appellants *did not* demand or move for an election by Respondents, as to whether the principal or agent should be held and the failure to do so was a *waiver.*"

In the A.L.R. case, *John D. Hospelhorn, Receiver, et al vs. Philip L. Poe, et al,* Maryandl Court of Appeals, April 21, 1938, 118 A.L.R. 682 ,after pointing out the principal and agent could be joined as parties Defendant, in the annotations at page 705, it state, "If both Defendants are found to be liable . . . then the Court should direct an election be made and enter judgment accordingly."

At page 707, this appears, "If he sues both, however, the only remedy of Defendants is by motion to compel him to elect." At the same page, "B. Waiver of right to compel election." "It has been held that the rule that the Plaintiff before the close of the case must elect whether he will take judgment against the one or the other is subject to an exception, or modification, which holds that the right to compel an election is waived by failure to demand or move for that remedy during the course of the trial." (A California case)

Again at page 707, also a California decision, this is stated, "So, where . . . judgment is entered against them jointly, . . . without raising the question of an election by demurrer, motion, demand, or otherwise the right to compel an election is thereby waived and may not be raised for the first time on appeal."

In a New York decision, this is quoted at page 707-708, "Where Plaintiff sues both . . . where Plaintiff's motion for judgment on the pleadings against the agent was granted by the trial Court at the opening of the trial, the principal could have then insisted that Plaintiff had made an election binding on him to hold the agent only, and a motion for dismissal of the complaint as against the remaining Defendant, if made, must have been granted; however, the Appellate Court was of the opinion that no such motion was made, either then or thereafter, and no request made that the Court so hold, the point was waived."

Plaintiff submits, the question of "election" was never raised in the lower Court.

POINT 6.

THE QUESTION OF "ELECTION" CANNOT BE RAISED FOR THE FIRST TIME ON APPEAL.

The rule has long been established, that a point cannot be raised for the first time on appeal. The Court reiterates that position in the Costello case, and again in the A.L.R. case at page 707, see above quote.

POINT 7.

IF THE FOREGOING ARE NOT PERSUASIVE, THEN THE PLAINTIFF SHOULD NOW BE GIVEN THE RIGHT TO "ELECT" TO PROCEED AS TO KETCHUM.

If any or all of the above is not persuasive, then Plaintiff requests the privilege to now dismiss the worthless judgment against Stevens, and proceed to trial as to Ketchum.

Plaintiff's counsel wishes to point out, the Costello case was not familiar to him until presented on appeal. Certainly had we been obliged to elect in the lower Court, we would not have elected Stevens, who was out of the jurisdiction and judgment proof. We were never asked to elect. We took the Stevens judgment to clear the case for appeal.

The current decision says, "She took judgment against Stevens, and the lower Court dismissed the action as to Ketchum." Again, in the last line of the decision, ". . . the complainant must make an election as to which he chooses to hold responsible. Such an election has been made in this case."

Plaintiff contends that the record shows judgment was given as to Ketchum first, and a month later the judgment was signed as to Stevens. The inference from the opinion was judgment was first given as to Stevens.

Plaintiff further contends that in view of the above cases, that to the Court's ruling here that Plaintiff must elect, should be added the words, if demand is so made.

Plaintiff further contends that no demand was ever made, nor did she ever make an election.

In the Costello case, no election was made, and on appeal, this Court said at page 773, "Since the respondent in his brief has stated that if the Court should find that he is not entitled to judgment against both appellants then he requests that he be allowed to make his election in this Court and chooses to hold the agent Kastler. We deem it proper to grant the request." At page 777, the Court said, "Affirmed with instructions to vacate the judgment against appellant Uranium Chemical Corporation."

In the A.L.R. case, annotations, page 708, a Texas decision, this is stated, "Judgment as to both. Both could not be held." And then this, "It was further held that the Plaintiff would in the appellate Court be allowed to elect to hold the agent and dismiss as to the principal, that the Court stating that this right should be accorded for two reasons; in the first place the record showed the Plaintiff was entitled to judgment against either Defendant he might choose to hold, and not having been theretofore called upon to make his election, he should be permitted now to do so; . . . ".

If elect we must, then we ask permission now to elect Ketchum.

POINT 8.

ASSUMING THAT STEVENS HAD NOT RECEIVED PAYMENT, BUT HAD COMPLETED THE DEAL, AND THEN SENT KETCHUM ALL PAPERS, COULD KETCHUM RECOVER COMMISSION ON SALE?

This question is posed, since it has bothered Plaintiff's counsel all during the proceedings. Judge Crockett broaches the same, in saying that if the principal, though undisclosed, received the benefits, he could be held jointly with the salesman.

Put another way, suppose Stevens, acting clearly within the scope of his authority, obtained a buyer for Plaintiff, all papers signed and deal closed. Ketchum was never mentioned. Then Stevens sends all documents to Ketchum, who learns about it for the first time. His agent has performed the service, the broker is entitled under the statute to sue for the commission.

How far would Wilkerson get, in a defense of undisclosed principal? It seems to Plaintiff to be a two way street. If undisclosed principal could recover commission, when apprised of facts, then Wilkerson in turn should recover from undisclosed principal.

CONCLUSIONS

1. That the rule of "undisclosed principal" has no application where a licensed broker and a licensed salesman are involved in the transaction

2. That the right to have an election made, was never demanded, and therefor waived.

3. The question of an election cannot be raised for the first time on appeal.

4. That the Court should pass upon the issues raised in Plaintiff's brief as to the liability of Ketchum

as principal, and the matter sent back to determine that liability, and give Plaintiff her day in Court.

5. In a final alternate, that Plaintiff be permitted now to elect to proceed aganst Ketchum, dismiss her judgment as to Stevens, and the matter returned to the lower court for determination of Ketchum's liability.

Respectfully submitted,

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