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Verda Lynn Dba Lynn Realty and United Farm Agency, Inc v. K. C. Ranches, Inc., A Utah Corporation : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

VERDA LYNN dba LYNN REALTY and UNITED FARM AGENCY, INC., a Utah Corportion,

Plaintiffs and Respondents,

vs.

K. C. RANCHES, INC., a Utah Corporation,

Defendant and Appellant.

Case No. 10611

BRIEF OF APPELLANT

Appeal from the Judgment of the Third District Court for Salt Lake County, The Honorable Stewart M. Hanson, Presiding

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STATEMENT OF THE NATURE OF THE CASE

Plaintiffs and Respondents as Real Estate Brokers and agents have sued K. C. Ranches, Inc., for a real estate commission based upon a listing agreement, and upon the signing of an Earnest Money Receipt and offer to purchase, and the said K. C. Ranches, Inc., contends there was no binding agreement or meeting of the minds in regard to the matter and thus no commission is payable.

DISPOSITION IN LOWER COURT

The District Court of Salt Lake County, sitting without a jury, rendered judgment in favor of Plaintiffs for a real estate commission in the sum of $15,950.000 together with interest in the sum of $797.50.

RELIEF SOUGHT ON APPEAL

Defendant and Appellant seeks an order of the Court that no real estate commission was earned or payable and in no event was binding on K. C. Ranches, Inc., and consequently the judgment rendered in the lower court should be reversed.

STATEMENT OF FACTS

On or about April 23, 1965, Mary H. Bennett, Secretary of K. C. Ranches, Inc., a Corporation, entered into a listing agreement with United Farm Agency (Exhibit P-1) for the sale of about 884 acres of ranch type property located near Roosevelt, Utah. The terms of the sale as listed include a sale price at $135,000.00 with 29% to be paid as a down payment, being $39,150.00 cash.

On or about May 17, 1965, Verda Lynn, dba as Lynn Realty, presented to Mary H. Bennett an Earnest Money Receipt and offer to purchase (Exhibit P-2). At the time the offer was presented to Mary H. Bennett, it contained the signatures of the prospective purchasers, James L. and George G. Gamble in two places (R. 40, 41). The offer provided for no earnest money payment to go to sellers

as consideration, no cash down, but an interest in land, to be traded, which was located in Davis County, Utah, by June 1, 1965. The sale price for the Ranch property was thus shown to be $159,500.00 and the interest in land being traded was shown at $25,000.00.

Mary Bennett did not sign the offer or date the same in the spaces provided for the seller, or where the Gambles had signed. Instead Mrs. Verda Lynn wrote in ink at the bottom of the offer "Commission to be paid by 50% ownership in the 25 acres of land being traded". Then Mary Bennett insisted in writing on the offer further, in her handwriting, "must be accepted by United Farm Agency, K. C. Ranches, Inc., Mary H. Bennett, Sec." (R-39, 40)

There was no written acceptance by United Farm Agency or Verda Lynn dba Lynn Realty, and whether there was any verbal acceptance is in serious dispute, nor were there any further signatures or initials made on the document by the prospective purchasers or other acknowledgment of acceptance by them after the inked-in portion shown on the Earnest Money Receipt and offer to Purchase was placed there by the said Mary H. Bennett.

Within a matter of two days or so from May 17, 1965, Mary H. Bennett notified the prospective purchasers and the real estate people that the transaction was off (R 42, 43; 92-5; 93-4). Then on May 29, 1965, a registered letter was received by United Farm Agency from K. C. Ranches, Inc. notifying them to withdraw the K. C. Ranches, Inc. properties from the market, (Exhibit D-5). Thereafter, the

prospective purchasers, Gambles, were sold another piece of real property by the United Farm Agency and Verda Lynn and they split the real estate commission (R102-11).

Also, K. C. Ranches, Inc. subsequently conveyed all the properties in the name of K. C. Ranches, Inc., including the property involved in this law suit, to Doxey-Layton Company (R 48-19). Subsequently, Doxey-Layton Company sold all the K. C. Ranches properties to a Mr. Mangum for approximately $137,000.00 on contract (R 47-19; 48-3).

The facts further show that K. C. Ranches, Inc. was a Utah Corporation with 15,000 shares of stock issued, and that the main business of the Corporation was ranching and farming (Exhibit P-3). Also, at the time Mary H. Bennett entered into the listing agreement with United Farm Agency as well as the time when the offer of May 17, 1965 was presented to her, no resolution or other Board or corporate act authorizing the sale of the corporate properties and assets had been entered into or passed (R 44-22).

ARGUMENT

POINT I

THE COURT ERRED IN HOLDING THAT THE EARNEST MONEY RECEIPT AND OFFER TO PURCHASE WAS A VALID AND BONA FIDE CONTRACT.

The question in this case does not involve the fact of whether Plaintiffs presented a Buyer ready, willing and able to purchase in accordance with the

listing agreement in order to entitle them to a commission, but rather the question appears to be whether or not there was a bona fide contract actually entered into and a meeting of the minds, on the terms that were different from the listing agreement, between the parties concerned. This included the Plaintiffs as well as the purchasers.

It appears to counsel for Appellant that the purported Earnest Money Agreement fails in two areas of contract law, to wit: (1) acceptance of the offer and, (2) consideration.

As to the acceptance of the offer by K. C. Ranches, Inc., as it was presented to Mary Bennett on or about May 17, 1965, it is clear from Exhibit P-2 and the evidence that the offer was unacceptable because of the problem of real estate commission and no cash down payment (R 55-10; 58-12; 64; 90). Consequently the fact that K. C. Ranches did not sign where the offer called for the Seller to sign, but instead wrote on the bottom of the offer by hand "commission to be paid by 50% ownership in the 25 acres of land being traded. Must be accepted by United Farm Agency", constituted nothing more than a counter offer on the part of K. C. Ranches, which in turn required an additional acceptance on the part of the purchasers, who were the original offerors.

This is fundamental law, as stated in Volume 17, American Jurisprudence 2nd, Page 400-1, Section 62:

> The rule is fundamental that an acceptance must comply with the terms of the offer

> — that is, in order to form a contract, the offer and acceptance must express assent to one and the same thing . . . an offer imposes no obligations until accepted according to its terms, without qualification or departure. ..... A qualified acceptance is simply a counteroffer — it is also a general rule that where an offer is made to a particular person, a reply which attempts to substitute or add another as a party to the proposed contract, for direct performance of or participation in the fulfillment of the obligation involved or a material part thereof, is tantamount to a counteroffer and in effect a rejection of the offer.

In our case, not only was there a clear cut qualification imposed by K. C. Ranches, Inc., but another party, the real estate people, were brought into the offer, and thus a rejection of the original offer.

The question then arises, whether or not there was an acceptance of the offeree's conditions, qualifications, and counteroffer in some way by the purchasers before the withdrawal of said counteroffer by Mary H. Bennett.

We submit to the court that there was no such acceptance by the Gambles, the offerors.

The usual, customary and proper way to have shown the acceptance and consent by the Gambles was t o have them initial or sign below the counteroffer or qualification, as they had previously done on the offer, below the portion referring to the dairy stock (Exhibit P-2), and especially in view of the fact that 25 acres of land was not shown in the original offer by the Gambles, but only a $25,000.00

interest in land. It had to be acknowledged that it was 25 acres and not 20 or 21 acres or some other figure. This was not done. Nor was any other form of acceptance shown by the offerors. In fact the only evidence appears to be that the question of commission and trade of some 25 acres of land was still up in the air (R 70-21) at the time the first communication was made between Mary H. Bennett and James Gamble (R 79-28) and this was about two days or so following the 17th day of May, 1965. Mr. Gamble testified as follows (R 80-22): "and I contacted her there and asked her if she still wanted us to come out and take over, and she said, 'NO', I have met some complications. I will contact you later."

Then again, on cross examination, in response to the question about whether Mr. Gamble had anything to say about the qualifications and conditions imposed by K. C. Ranches, Inc. on the offer as communicated to him, he answered, "I didn't say nothing. It wasn't nothing to do with me. It didn't matter to me one way or the other." (R 82-84).

But it did matter. Some acknowledgment had to come from them, not only as to the 25 acres being the amount traded, but also their willingness to deed the ownership in others than the Seller.

Thus, there was no attempt on the part of the purchasers, offerors, to accept the counteroffer and qualifications imposed by K. C. Ranches, Inc.

Again to cite some fundamental law, Volume 17, American Jurisprudence, 2nd Page 405, Section 66.

> Where an offeree does not accept the offer as made but makes a qualified or conditional acceptance, there is no contract unless the offeror consents to the qualification or condition tendered by the Offeree. Undoubtedly, an offeree has the right to make his acceptance depend upon any fact he might name, including the approval of the offer by his attorney.
>
> See also annotation of cases cited in 135 ALR 822-3.

Therefore, inasmuch as Mary H. Bennett informed the parties and Plaintiffs within a matter of a couple of days of her withdrawal of the offer and not wishing to go ahead on any deal, (R 59-29; 80-22; 92-6; 93-8), there was no binding contract entered into which would permit a commission to be paid.

As to the question of consideration in the offer to purchase, there was no consideration given that would make a binding contract between purchasers and sellers. The only consideration mentioned or involved was $1.00 to Verda Lynn for presenting the offer, and that seems questionable, but not even that amount was to go to K. C. Ranches, Inc. to apply on, and as consideration in the transaction, as noted from exhibit P-2. Furthermore, on a $159,-500.00 deal there appeared no way to charge the purchaser with any damages if they had chosen to back out of the transaction, because there was absolutely nothing paid down to bind the deal, to use as liquidated damages as the agreement called for, and there was no attached inventory of equipment or livestock, making the offer completely uncertain

and again providing an escape for the purchasers if they so desired.

There was not only an insufficiency of money or moneys worth with this size of a transaction, but there was no benefit to the promisor or detriment to the promisee involved, and certainly nothing moving, as consideration, to the Seller. Consequently there was no binding contract, and Plaintiffs earned no commission.

POINT II

THE COURT ERRED IN RULING THAT THERE WAS AN ACCEPTANCE BY UNITED FARM AGENCY OF THE CONDITION AND QUALIFICATION IMPOSED BY K. C. RANCHES, INC. IN THE OFFER.

The terms of the offer presented to Mary H. Bennett for K. C. Ranches, Inc. were considerably different than the terms on the listing agreement (Exhibit P-1), and the main difference, perhaps, was in the down payment. The listing agreement called for 29% down payment in cash, or $39,150.00. The offer of May 17, 1965, called for no cash payment, but a trade of a $25,000.00 interest in land in Davis County, Utah. So the evidence is clear that Mary H. Bennett was seriously concerned about the payment of a $15,950.00 commission, and there could be no deal until this part of the transaction was completely cleared up (R 57, 58, 64). Consequently, the qualification and condition was written in on the bottom of the offer involving the commission and the acceptance by United Farm Agency.

Now aside from the fact that the handwritten portion amounted to a counteroffer which required a further acceptance from the purchasers, Gambles, to be binding, it also involved the attempted creation of a new commission agreement, between K. C. Ranches, Inc. and United Farm Agency which was different from the listing agreement previously binding them. This new writing then, obviously required an acceptance on the part of United Farm Agency for the same legal reasons as set out in the argument for Point I, herein in order to be binding and so that the parties would not be bound or relying on the listing agreement for the commission (Exhibit P-1). Now the very fact that Plaintiffs have relied all along in this lawsuit and sued upon the listing agreement (Exhibit P-1) for their commission, they conversely have not relied upon, intended to be bound by, or accepted the new agreement purportedly made and thus should be estopped from attempting to collect a commission. Furthermore Plaintiff, Verda Lynn, was never a party or involved with the listing agreement and cannot sue thereunder. Plaintiffs did not present a Buyer ready, willing and able to perform in accordance with the terms of the listing agreement and cannot obtain a commission based upon that agreement. Had Plaintiffs intended to accept the commission agreement as purportedly offered by K. C. Ranches, Inc. on May 17, 1965, they would have based their lawsuit on that agreement and sued for the value of what 50% of the said 25 acres of land was reasonably worth. We believe this is additional evidence, in addition to that which

is set out in the record, of the non acceptance by United Farm Agency.

Now when Mary H. Bennett insisted on writing in the offer (R-39) "must be accepted by United Farm Agency," this is exactly what she meant, and this was not done, either written or any clear cut verbal expression.

Mrs. Verda Lynn, one of the Plaintiffs, testified on direct examination in regard to the qualification on the commission, that she handed the offer to Mary H. Bennett to sign and Mrs. Bennett said: "This will have to be accepted by Mr. Massey" (R 90-27). Mrs. Lynn then argued with her that she was accepting for Mr. Massey and United Farm Agency, but Mary H. Bennett still insisted on having an acceptance from him (R 91-3). Then Verda Lynn testified that she got in touch with Mr. Massey and he was told "Will you please get in touch with her too and tell her you have accepted it?" (R 91-20). This was never done by Mr. Massey. Then again on cross examination Mrs. Lynn stated in response to the question "Why was it so strong about United Farm Agency accepting it?" as follows: "She wasn't that strong on the thing. We wrote it in because she said, *"I want to be sure on this!"* Therefore, this was not a matter of an agent accepting for his principal, but a clear cut intent to have an acceptance from United Farm Agency, and that was part of the condition and qualification. The Lower Court found that Verda Lynn accepted for United Farm Agency, but we submit that this was not sufficient. There should have been a finding of whether United

Farm Agency actually accepted. Furthermore, Mary H. Bennett's testimony was emphatic about the fact that United Farm Agency, not only finally turned down the qualification about the new commission arrangement (R 43-16), but also was emphatic and positive about their not wishing to go on the deal unless the land was worth it and could be sold quickly, which was another condition attached to any acceptance. (R 43-18; 56-11; 58-12; 61-4; 104-20) Also, Mr. Massey did not fully dispute this part of the evidence (R 99-9; 101-26). We submit, therefore, that the matter was still left in doubt and up in the air, and not an unqualified acceptance on the part of United Farm Agency.

Another matter which should be mentioned here, is as to the credibility of the testimony of Mary H. Bennett. It should be kept in mind that counsel for Defendant and Appellant was substituted in the case because of the interest in the outcome of the matter of Doxey-Layton Company. Mary Bennett had her own separate legal counsel. Thus, if she was an adverse witness, she was adverse to both sides. In order words, Mary Bennett had nothing to gain or to lose as to that part of the evidence she actually testified to. On the other hand, Mrs. Verda Lynn and Mr. Jarrell Massey were directly interested and prejudiced from a monetary standpoint about the outcome of the case. In this respect, we submit to the Court that even greater weight and credibility should be given the testimony of Mary H. Bennett than the other interested parties.

As to the necessity of a written acceptance by United Farm Agency on the new commission agreement, we believe that the whole import and intent imbodied in the condition "must be accepted", required additional signatures or written acceptance, and especially where Mary H. Bennett was not satisfied with Verda Lynn's oral acceptance (R 90-27). This was also Mary Bennett's testimony (R 64-30; 65-2; 105-4).

In Volume 17, American Jurisprudence 2nd, Page 410, Section 71, it states:

> A contract may be signed on condition that it shall not take effect until others have signed it or it may be the manifest intent of the parties that the contract is not to be effective until signed by all intended parties; in such case, in the absence of any of the signatures so required, the contract being joint, cannot be enforced against those who did sign it.

See also Utah Code Annotated, 1953, 25-5-4 (5) and combined *Metals, Inc. vs. Bastian,* 71 U.535; 267 P 1020, for necessity of a writing in such cases.

POINT III

THE ACTION OF MARY H. BENNETT IN THE TRANSACTION WAS NOT BINDING ON THE K. C. RANCHES, INC., CORPORATION.

In response to counsel for Plaintiffs' question, "Were you authorized by the Corporation to sign this document?", Mary H. Bennett answered, "No one had given me any authority. I took it upon myself." (R 44-22).

Counsel also made a point of the fact that 15,000 shares of stock had been issued, (Exhibit P-3), although Mary Bennett appeared to be the principle stockholder.

In view of these facts and further that the real estate transaction contemplated here involved all, or essentially all, of the property and assets of K. C. Ranches, Inc., Corporation, it required notice, a proper meeting, consent and resolution of the stockholders and board of directors in order to bind the Corporation.

Under the Utah Business Corporation Act, 16-10-74 of the Utah Code Annotated, 1953, it sets out in detail the requirements which must be followed by a corporation to authorize the sale of all, or substantially all, the property and assets of the Corporation, if not made in the usual and regular course of its business. None of these steps was taken or complied with by the officers or directors of K. C. Ranches, Inc., Corporation in this case. Furthermore, there should be no question here that the sale of all the ranch and farm properties, equipment and stock was not "in the usual and regular course of its business." The purpose of the Corporation as set out in its Articles of Incorporation on file (Article VII (1)) and as shown by (Exhibit P-3), was "to engage in the business of farming and ranching." To sell all of the ranch and farm properties on contract would then actually put the corporation out of business.

Furthermore, the Articles of Incorporation on file in the Secretary of State's Office, of the K. C.

Ranches, Inc., show in Article X that "The Board may not sell or exchange all of the property of the corporation in bulk unless there shall have been prior ratification of such action, said ratification shall be in the form of an affirmative vote of not less than 50% of the outstanding capital stock of the corporation."

Here, no Board meeting was held, no vote taken, no ratification of the action, and thus no authorization binding the corporation in the sale.

Consequently, counsel for Appellant contends that the action of Mary H. Bennett in the transactions could not and did not bind the Corporation, K. C. Ranches, Inc., and Plaintiffs' judgment against said Corporation should be reversed.

See also Volume 19, American Jurisprudence 2nd, Page 911, Section 1533.

POINT IV

PLAINTIFF CANNOT CLAIM A REAL ESTATE COMMISSION BASED UPON THE LISTING AGREEMENT, AND THEY SHOULD BE ESTOPPED FROM COLLECTING THIS COMMISSION.

The listing agreement, Exhibit P-1 Paragraph (c) provides: "I agree to pay you forthwith as commission 10% of the selling price, when a purchaser is procured through you, or your representative at the stated price and terms, or at any other price and terms acceptable to me." Then in Paragraph (d) of the same agreement it provides: "If the property

described herein is sold, during the term of this agreement, to a purchaser procured through my own efforts, or through any broker, agent, person or organization other than you, I will immediately pay you one-half the amount of commission provided in clause (c) above." (Thus, any new commission arrangement had to be accepted not only by Verda Lynn, but also specifically by United Farm Agency.)

Now Verda Lynn was not a party to the listing agreement, so any commission she might earn had to come through United Farm Agency, or a new agreement.

On the Earnest Money Receipt and offer to purchase, (Exhibit P-2, at line 41), it provided for an amount to be inserted as to a commission to be paid the selling agent. This was left blank and when the offer was presented to Mary Bennett, the terms were not acceptable to her and were not in accordance with the terms of the listing agreement, especially as to cash down payment. So when Mary Bennett wrote in the offer the conditions about payment of a commission, what effect did this have on the listing agreement, even if we assume for this argument that all parties involved had accepted the conditions on the offer? We submit that the effect would be a new commission agreement, and would do away with and make null and void the listing agreement (Exhibit P-1) as it pertained to the amount of commission payable. Mary H. Bennett had refused to pay a 10% commission of the selling price, by this new agreement, and so if we again assume there

was a breach by K. C. Ranches, Inc. of the new agreement, does this mean that Plaintiffs may then revert back to the former listing agreement and sue thereon? We think not. Plaintiffs remedy would be to sue on the agreement and contract breached, if any, and by not doing so we contend that Plaintiffs have waived their remedy. It is obvious, therefore, that Plaintiffs may not recover a 10% commission based upon the listing agreement, for it is clear that this was never agreed to by the parties. (See *Miller vs. Cortese*, 271 P 2nd 87 and also *Cooley vs. Frank*, 235 P 2nd 446.)

As to a further argument that Plaintiffs should be estopped from collecting this commission, we refer the court to the evidence given by United Farm Agency through Mr. Jarrell Massey in response to a question put to him as to why he had not signed his name after Mary Bennett's on the offer, wherein he stated (R 102-7):

> It was never brought out there and never was really considered necessary. In fact, we went ahead and through Lynn Realty sold these same buyers some property later, and she went ahead and handled the arrangements and took care of the commission split. We didn't sign any agreement on it either.

Therefore, since these buyers pursued the matter no further, and went ahead with the purchase of another property, and since these same Plaintiffs, as real estate agents, each received their full commission from the sale, they have acquiesced in and consented to the withdrawal of the K. C. Ranches,

Inc. transaction and should be estopped from collecting another commission herein.

Furthermore, Mary H. Bennett's testimony in her conversation with Mr. Massey of United Farm Agency involving a possible lawsuit over commissions was as follows: (R 104-27):

> . . . and he also told me whether the deal went through or not, and he would just as soon it didn't, because Mrs. Lynn could not sue without his help and he says, "United Farm Agency does not make sales, when it isn't to the benefit of all parties concerned."

This evidence is corroborated by Mr. Massey as shown in the Record (R 102-22), and again at (R 103-3) wherein Mr. Massey said "Well, let's get one thing straight. I am not suing for a commission" — "as far as my bringing a suit, well, I didn't do that. Let's put it that way."

It is therefore obvious that such a conversation took place between Mr. Massey and Mrs. Bennett as she testified to, and consequently Mary Bennett was led to believe, even if there had been a valid deal between them, that she had no concern about a lawsuit with respect to a commission.

It would be most inequitable and unjust in view of Plaintiffs conduct of selling and receiving a commission from Buyers on another property and their apparent acquiescence and consent in the action and decision of Mary Bennett to allow Plaintiffs a commission on this transaction and they should be estopped from collecting the same.

CONCLUSION

The law is clear that the condition and qualification set out by Mary H. Bennett on the offer of May 17, 1965 amounted to a mere counter offer, at most, which required an acceptance on the part of both buyers and United Farm Agency before a binding contract could be created.

It is also clear, from the evidence, that no written acceptance of said counter proposal existed, which we believe was required and the actual intent of the parties, nor was there any meeting of the minds from a verbal or oral standpoint on the acceptance of the counter offer by either buyers or Plaintiffs.

Furthermore, were we to assume a valid acceptance on the part of United Farm Agency in regard to the commission, a new commission agreement would have existed and Plaintiffs could not recover any 10% commission as based upon the original listing agreement, and in effect Plaintiffs have sued upon the wrong contract.

It is apparent, also, from an examination of the evidence and the Utah Business Corporation Law, that Mary H. Bennett had no authorization of K. C. Ranches, Inc., corporation to sell substantially all of the corporate assets, and any agreement that may have been attempted by the said Mary H. Bennett could have no binding affect upon the Corporation.

Finally, the fact that United Farm Agency never did intend to sue for themselves for a commission and the fact that each of the Plaintiffs received

a commission on the sale of other properties to these same buyers, negates any damages to them in regard to this transaction and it would be inequitable and unjust for them to collect another commission here.

Clearly, therefore, the judgment of the Lower Court should be reversed.

Respectfully Submitted,

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