

1967

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

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IN THE SUPREME COURT OF THE STATE OF UTAH

VERDA LYNN d/b/a LYNN
REALTY, and UNITED FARM
AGENCY, INC., a Utah corporation,

Plaintiffs and Respondents,

vs.

K. C. RANCHES, INC., a Utah
corporation, *Defendant and Appellant.*

Case No.
10611

UNIVERSITY OF UTAH

JAN 13 1967

BRIEF OF RESPONDENT

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

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BRIEF OF RESPONDENT

STATEMENT OF FACTS

The facts set forth by appellant in its brief are substantially correct as to the factual matter contained therein, but conclusions of counsel not support by the evidence or facts should be disregarded by the Court.

With regards to Exhibit P-2, the Earnest Money Receipt and Offer to Purchase, it is significant to note that following the signing of the Earnest Money Receipt

and Offer to Purchase by the purchasers in three different places, the defendant corporation, by and through its secretary, signed the agreement in the place indicated by appellant in its statement of facts, but in addition also signed the agreement on line 46 of said agreement acknowledging receipt of the final copy of the foregoing agreement bearing all signatures. Likewise this was dated by the defendant. (R-40)

It is significant to note certain additional facts:

(1) That K. C. Ranches, Inc., transferred the property to Doxey-Layton Company for no consideration whatsoever after the commencement of this action. (R-18, 19, 51, 52, 53 and 106)

(2) That Mary K. Bennett was the only officer and director of K. C. Ranches, Inc., within the State of Utah having a legal capacity to contract. (R-37) (R-75)

(3) That at the time of the execution of the listing agreement, plaintiff's Exhibit P-1, her husband, an officer and one of the three directors of the company, was incarcerated in the State Hospital at Provo, Utah, (R-36), and awaiting trial for murder. (R-72)

(4) That the corporation did not requidate the execution of the listing agreement or Earnest Money Receipt and Offer to Purchase by the letter of May 28, 1965, introduced by defendant as Exhibit D 5.

(5) That Mary K. Bennett consistently refused to testify under the Fifth Amendment to the Constitution of the United States as to her personal dealings with

K. C. Ranches or with Doxey-Layton Realty and to whether or not she had embezzled money from Doxey-Layton which was put into K. C. Ranches, and that being the reason for the transfer by K. C. Ranches back to Doxey-Layton of the property in question. (R-53, 105 and 106)

(6) That at the directors meeting allegedly held about May 28, 1965, the said Mary K. Bennett was the only director present at that meeting, and it was at this time that the offer was withdrawn. (R-74)

(7) That both the agent of United Farm Agency, Inc., one of the plaintiffs herein, and Verda Lynn, testified that they had agreed to accept the commission payment specified by Mrs. Bennett and K. C. Ranches, Inc. on Exhibit P-2 on the day or day after the execution of said earnest money receipt and offer to purchase (R-90, 91, 89 and 99).

(8) That the evidence of plaintiff showed that the defendant did not advise anyone of its decision to refuse to go through with the purchase until some time after the 23rd of May, 1965. (R-80)

ARGUMENT

POINT I

THERE IS SUFFICIENT COMPETENT EVIDENCE IN THE RECORD TO SUPPORT THE COURT'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT.

The court specifically found in its memorandum decision and its findings of fact and conclusions of law that the said Mary K. Bennett, the secretary and director of the defendant corporation, executed the listing agreement, plaintiff's exhibit No. P-1, and the Earnest Money Receipt and Offer to Purchase, plaintiff's Exhibit P-2. The court further found that she had authority to bind the corporation and that plaintiffs accepted and agreed to take the one-half interest in the land being taken as down payment as their commission. (Findings of Fact and Conclusions of Law R-17, 18 and 19)

It is submitted that the citation of authority for the proposition that the Supreme Court will not alter the decision of the Trial Court where there is substantial evidence to sustain the decision of said court would unduly prolong this brief as the court has so held on many occasions.

POINT II

MARY K. BENNETT, AS SECRETARY AND DIRECTOR OF THE DEFENDANT, BOUND SAID CORPORATION BY HER ACTIONS.

The record is replete with the undisputed facts that Mary K. Bennett was the sole officer and director with-

in the State of Utah of the defendant corporation. Likewise she had ownership of virtually all of the stock of the corporation, save and except qualifying shares of her husband and a Mr. Black, who resided in Colorado. The corporation was merely a shell for the operations of Mrs. Bennett. According to her own testimony when the letter of May 28, 1965, Exhibit D-5, was drafted and sent to the plaintiff, United Farm Agency, the board of directors meetings of which she mentions in said letter consisted of merely herself meeting with herself to decide what she would do. (R-74) It is interesting to note that the letter of May 28, 1965, did not repudiate the actions of Mrs. Bennett in making the listing agreement, and impliedly thereby did not repudiate the execution of the Earnest Money Receipt and Offer to Purchase, and the defense of lack of corporate capacity was not raised by affirmative pleading in its answer as required by Rule 8 (c) U.R.C.P.

As the corporation was actually being conducted in essence as a sole proprietorship by the said Mary K. Bennett, it would have been a fruitless and meaningless act to go through the motions of convening a meeting of the board of directors for Mrs. Bennet to conduct a meeting to be attended only by herself for the purposes of passing a corporate resolution authorizing her to enter into this Earnest Money Reciept and Offer to Purchase.

Appellant quotes the Utah Business Corporation Act, 16-10-74, as authority for the requirement of a board meeting and written or printed notice to each of the stockholders of the contemplated sale. It is submitted

that the purpose of this particular section of the Act is for the protection of the stockholders and not of persons dealing with the corporation. This is evidenced by 16-10-75 and 16-10-76. Appellant refers to the Articles of Incorporation of said corporation. These were not put into evidence by defendant and properly may not now be referred to. However, as Mary K. Bennett owned ostensibly 98% of the outstanding shares, such a ratification may be inferred from the fact that she entered into the contract herself.

Be it as it may, the very conduct which appellant now claims to have been in violation of Utah Code, it followed when it transferred its property to Doxey-Layton for no consideration whatsoever. It is submitted that the reason for the transfer to Doxey-Layton is because the said Mary K. Bennett, in her personal dealings, transferred the corporate property to Doxey-Layton as a means of solving her own difficulties.

As there was ample evidence to sustain the court's findings, the findings will not be upset except for manifest error.

POINT III

PLAINTIFFS ARE ENTITLED TO THEIR REAL ESTATE COMMISSION BY REASON OF HAVING PROCURED A BONA FIDE SALE OF THE PROPERTY LISTED BY DEFENDANT CORPORATION.

The evidence is clear that the plaintiffs found a buyer ready, willing and able to purchase the land of

defendant, and that further the plaintiffs had agreed to accept their commission in the transfer to them of an interest in land. 2

The Earnest Money Receipt and Offer to Purchase, Exhibit P-2, between purchaser and seller, was complete and nothing was left to be done as between them, and constituted a binding contract. *Bunnell v. Bills*, 368 P.2d 597, 13 U.2d 83. The document was filled out and signed by all parties, and receipt of the final offer was acknowledged by the corporate officer and director, Mary K. Bennett.

The arrangement between the plaintiffs and seller was an agreement separate and apart from that between the purchaser and seller, as the purchasers had no interest and could have no interest in the payment of the commission from the seller to the plaintiffs.

Seller made an offer to the plaintiffs to pay their commission by the acceptance by them of an interest in certain land. This offer was accepted by both of the plaintiffs. *Thornton v. Pasch*, 139 P.2d 1002, 104 U. 313. All of the terms and conditions would have been further reduced to writing (R-92) thereby placing the terms and conditions at this point partially oral and partially in writing in one written document. *Radley, et al, v. Smith, et al*, 313 P.2d 465, 6 U.2d 304. The mere fact that the acceptance of the commission terms was oral is inconsequential. *R. J. Daum Construction Co. v. Child*, 247 P.2d 817, 112 U. 194.

At no time until the commencement of this action

did the defendant raise as an issue the acceptance of the commission in land. This was not the reason for the withdrawal of the offer to sell the land; and the letter of May 28, 1965, Exhibit D-5, clearly shows that the reason for the withdrawal of the land from the market was not the commission basis, but that corporate affairs would be better served by holding the property. It is interesting to note that shortly thereafter the property was conveyed over to Doxey-Layton. Just how this better served the corporation is not clear.

It is submitted that everything was done that needed to be done, that Mary K. Bennett had spoken with Mr. Massey, the agent of the plaintiff United Farm Agency, Inc. by phone and confirmed the commission arrangement (R-98), and had been further advised by Mrs. Lynn that the terms of the commission payment were satisfactory not only to her but as to United Farm Agency whom she was representing as their agent.

CONCLUSION

It is respectfully submitted that the judgment of the lower court should be sustained.

There is ample and substantial evidence in the record to sustain the holding of the trial court, and it is respectfully submitted that plaintiffs are entitled to their commission and the commission is due and payable by the defendant.

A bona fide contract was entered into, which was

binding on all parties. The defendant's breach of this contract has resulted in damages to the plaintiffs, for which they are entitled to their judgment.

The judgment of the lower court should be affirmed and the respondents herein awarded their costs.

Respectfully submitted,

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