

2005

Michael C. Posner v. Equity Title Insurance Agency, Inc., a Utah Corporation : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MICHAEL C. POSNER,

Appellant,

vs.

EQUITY TITLE INSURANCE
AGENCY, INC., a Utah Corporation.

Appellee.

APPELLANT'S REPLY BRIEF

Appellate Case No. 20050556-CA

Appeal from the Ruling of the Third Judicial District Court,
The Honorable Tyrone E. Medley,
Granting a Motion for Summary Judgment

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iii
ARGUMENT.....	1
I. MR. POSNER’S DEPOSITION STATEMENT IS NOT RELEVANT PROOF THAT HE AUTHORIZED KANDIS CHRISTOFFERSEN.....	1
II. THE DOCTRINE OF APPARENT AUTHORITY SHOULD NOT EXCUSE EQUITY FOR BREACH OF ITS FIDUCIARY DUTIES TO POSNER.....	2
III. THE STATUTE OF FRAUDS IS RELEVANT TO THIS CASE.....	3
IV. POSNER’S REPC WAS MATERIALLY CHANGED.....	4
V. WRITTEN AUTHORIZATION WAS REQUIRED TO CHANGE POSNER’S REPC.....	5
VI. THE FINANCIAL GUARANTEE SUBMITTED WAS NOT A SURETY BOND.....	6
CONCLUSION.....	8

TABLE OF AUTHORITIES

CASES

<i>Bradshaw v. McBride</i> , 649 P. 2d 74 (Utah 1982).....	3
<i>Ellis v. Nelson</i> , 233 P. 2d 1072 (Nevada 1951).....	2
<i>Kouris v. Utah Highway Patrol</i> , 70 P.3d 72 (Utah 2003).....	5
<i>Polyglycoat Corp. v. Holcomb</i> , 591 P.2d 449 (Utah 1979).....	5
<i>Rogers v. Relyea</i> , 601 P. 2d 37 (Mont. 1979).....	5
<i>Surety Underwriters v. E & C Trucking</i> , 10 P. 3d 338 (Utah 2000).....	6
<i>Williams v. Singleton</i> , 723 P. 2d 421 (Utah 1986).....	3

STATE STATUTES

U.C.A. § 25-5-3 Statute of Frauds.....	3,4
U.C.A. §25-5-4 Statute of Frauds.....	2
U.C.A. § 31A-1-301 (80) (b) Definitions.....	6
U.C.A. § 31A-5-211 Minimum capital or permanent surplus requirements.....	7
U.C.A. § 31A-20-105 Indemnity agreements for surety corporation.....	7

RULES

Utah Admin.Code R162-6-1. (6.1.11.1.) Licensee conduct, Improper practices....	1
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ARGUMENT

I. MR. POSNER’S DEPOSITION STATEMENT IS NOT RELEVANT PROOF THAT HE AUTHORIZED KANDIS CHRISTOFFERSEN.

Equity cites the following deposition testimony that Posner “admitted under oath” that Christoffersen had authority to instruct Equity to close:

Q: Can you just elaborate on what your—what her [Ms. Christoffersen’s] role at closing was? Was there an agreement in place that she would be contacted?

A: The only reason Kandis was at the closing was to get her commission. And my contact with her as being I guess my agent was to make sure that it closed. And she was the one that was negotiating back and forth with the contract as far as making sure that we had a surety bond and how much it was and everything else.

This testimony does not acknowledge that Posner considered that Ms. Christoffersen would act in his place at closing. On the contrary, Posner says that “*the only reason Kandis was there was to get her commission.*” The next sentence of the quotation says only that Posner had subsequent contact with her to receive confirmation that the closing occurred. And the third sentence refers to negotiations concerning the surety that occurred before the closing (as there is no evidence that such negotiations occurred at closing on August 30). A real estate agent managing negotiations between two parties is merely facilitating communication, not making decisions *in place* of her principal.

The propriety of Ms. Christoffersen’s conduct depends on the presumed source of her authority: her listing agreement. Under Utah law, a principal broker and licensees acting on his behalf who represent a seller must have a written agency agreement with seller that defines the scope of the agency. Utah Admin. Code R162-6-1(6.1.11.1.) reads: “A principal broker and licensees acting on his behalf who represent a seller shall have a written agency agreement with the seller defining the scope of the agency.” As the scope

of Ms. Christoffersen's authority must be in writing, Posner's deposition testimony may not serve to create an agency retroactively for Ms. Christoffersen's conduct at closing.¹

II. THE DOCTRINE OF APPARENT AUTHORITY SHOULD NOT EXCUSE EQUITY FOR BREACH OF ITS FIDUCIARY DUTIES TO POSNER.

Equity's apparent authority cases do not govern the particular facts of this case. In Equity's cited cases courts found apparent authority in circumstances where third parties, *who lacked any relationship whatsoever* with the principal, drew a reasonable conclusion about an agent's authority based on the principal's and agent's conduct. In marked contrast to these cases, the third party in this case (Smith) was an agent who possessed a fiduciary duty *to the same principal* as the agent (Christoffersen) with alleged apparent authority. Ms. Smith completely abandoned the exercise of her own fiduciary duties based on an assumption (at odds with basic principles of real estate law she should have known as an escrow agent) that Ms. Christoffersen had the authority (again at odds with what Ms. Smith should have known as an escrow agent) to issue instructions to close with a document that did not, on its face, match the terms of Posner's Real Estate Purchase Contract (REPC).

Ms. Smith's role as a fiduciary not only required a higher standard of investigation on her part to verify exactly what authority Ms. Christoffersen possessed², but obliged her to exercise, rather than jettison, the fiduciary duties she owed to Posner. If she had done so,

¹ See also U.C.A. §25-5-4(1)(e): The following agreements are void unless the agreement, or some note or memorandum of the agreement, is in writing, signed by the party to be charged with the agreement...every agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation...

² See *Ellis v. Nelson*, 233 P. 2d 1072, 1075 (Nevada 1951): "[regarding the doctrine of apparent authority]: there can be reliance only upon what the principal himself...has done...and the reliance [must be]...consistent with the exercise of reasonable prudence..."

she would have caught Christoffersen's mistake. The doctrine of apparent authority does not excuse her from this omission.

III. THE STATUTE OF FRAUDS IS RELEVANT TO THIS CASE.

Equity objects to Posner's statement that trial court's ruling "violates the Statute of Frauds" (Equity's brief at p. 15-16) because neither the nature of Posner's action nor the resulting summary judgment ruling concerns an action to *enforce* a contract.³ Posner cites the Statute of Frauds, however, to delineate the outer limits of the real estate agent's authority.⁴ The part of §25-5-3 pertaining to agents states:

Every contract...for the sale, of any lands... shall be void unless the contract... is in writing subscribed by the party by whom the lease or sale is to be made, *or by his lawful agent thereunto authorized in writing.*" (emphasis added).

Mr. Posner, a party to a real estate contract which clearly fell within the scope of the Statute of Frauds, references §25-5-3 in order to show that his real estate agent was not authorized to make verbal changes to his REPC. The determination of whether an agent possessed proper authority under the Statute of Frauds may support a decision to enforce a real estate contract (see *Williams v. Singleton*, 723 P. 2d 421, 423-424 (Utah 1986) (joint tenant not authorized in writing had no authority to accept offer to purchase on behalf of other joint tenant), or assess ratification *Bradshaw v. McBride*, 649 P. 2d 74, 78 (Utah 1982) (no ratification as a matter of law because statute of frauds requires an agent to be authorized in writing.). In the instant case, the fact that Mr. Posner does not use his argument about Ms. Christoffersen's authority to enforce a contract does not preclude him from making the point at all. Nothing in the statutory text nor the

³ Perhaps it is more accurate to say that the trial court's ruling was inconsistent with the Statute of Frauds.

⁴ This point was not improperly raised. Plaintiff gave notice prior to the hearing that he would refer to §25-5-3 and the trial court gave defendants a week extra to reply to this issue, which they declined. (R. 644: p. 25 Ins.16-22, p. 29, p. 35, ln. 18-22) Defendant Equity cannot complain prejudice or unfairness as a result of Posner's so-called "tactic", especially in view of the trial court's ruling in favor of defendants.

underlying policy prohibits reference to the Statute of Frauds requirements regarding an agent's authority in order to determine whether those requirements were met. It is therefore entirely appropriate to analyze Ms. Christoffersen's authority in light of U.C. §25-5-3.

IV. POSNER'S REPC WAS MATERIALLY CHANGED

Posner's brief nowhere states that "the discrepancy between the figures \$263,900 and \$260,000 is a violation of the Statute of Frauds" (Equity's brief p. 21) nor does Posner suggest that the Financial Guarantee itself comes within the scope of the Statute of Frauds (Equity's brief p. 17), as this point is immaterial to his argument. Rather, Posner argues that Christoffersen exceeded her authority because her instructions effectively changed his REPC without his written approval and she was not authorized in writing to make such changes. Posner asserts: "At closing, Posner's REPC was materially changed without his written authorization." (Appellant's brief at p. 8).

Equity attempts to refute this point by discussing whether the \$3,900 discrepancy between the Financial Guarantee and the required \$263,900 surety bond *caused* the buyer's default (p. 21, Equity's brief). Causation is not the point. Plainly, the buyer's poor credit rating, lack of funds etc. and not the \$260,000 Guarantee were the *cause* of his default. Posner refers to the \$3,900 discrepancy to highlight the point that, in addition to accepting a "Financial Guarantee" rather than a surety bond as the REPC required, Equity accepted a document that changed the financial terms of the REPC. Even if Equity did not know the difference between a Financial Guarantee and a surety bond, Equity certainly knew that it was allowing closing to proceed with a document that did not meet the financial terms of the REPC.

The difference in price between the REPC and the Financial Guarantee should have put Equity on notice of a fundamental discrepancy between the two documents. By closing the transaction nevertheless, Equity effectively changed the terms of Posner's seller financing. The \$3,900 change was material because it increased Posner's seller financing to \$263,900 (over half the \$450,000 purchase price); in the event of a buyer default, the Financial Guarantee (even *had* it been what Posner requested) would only have paid back \$260,000, leaving Posner \$3,900 short. Posner certainly agreed to sell based on his expectation that his seller financing terms guaranteed him receipt *in full* of the negotiated purchase price.

Acceptance of a document that neither matched the form of financial security requested nor the seller financing amount the REPC required constituted a material breach.⁵ By closing in breach of the terms of Posner's REPC, Equity closed on a sale to an unqualified buyer. The sale to an unqualified buyer, absent the financial protection his REPC required, left Posner with no choice but to buy back his land when the buyer defaulted, and thereby directly caused Posner's losses.⁶

V. WRITTEN AUTHORIZATION WAS REQUIRED TO CHANGE POSNER'S REPC.

Equity agrees with the principle that when a contract must be in writing,

⁵ A material breach occurs when the failure of performance "defeats the very object of the contract" or "[is] of such prime importance that the contract would not have been made if default in that particular had been contemplated" *Polyglycoat Corp. v. Holcomb*, 591 P.2d 449, 451 (Utah 1979). See also *Rogers v. Relyea*, 601 P. 2d 37, 41 (Mont. 1979): "A substantial or material breach is one which touches the fundamental purposes of the contract and defeats the object of the parties in making the contract."

⁶ Under the applicable standard of review, Posner's claim that a breach occurred must be taken as true for the purposes of this appeal. See *Kouris v. Utah Highway Patrol*, 70 P.3d 72, 75 (Utah 2003): in reviewing a grant of summary judgment, [the reviewing court must] view the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party.

changes to the contract must also be in writing (Equity's brief p. 17). Equity sidesteps the application of this rule, however, by focusing on the Financial Guarantee itself, suggesting that "the Financial Guarantee was the only document that was 'arguably' changed in this case." (Equity's brief p. 17) On the contrary, the record clearly demonstrates that the change was made to Posner's REPC (See Addendum #3, Appellant's Brief). In neglecting to address this change, Equity fails to refute Posner's argument that written authorization was necessary.⁷

VI. THE FINANCIAL GUARANTEE SUBMITTED WAS NOT A SURETY BOND.

Equity's analysis of surety bonds misconstrues the fundamental distinction Utah Code Title 31A (the Insurance Code) makes in differentiating whether surety bonds are to be treated as insurance or not. The definitions section of the Insurance Code, Title §31A-1-301(80)(b)(ii) provides in pertinent part: " 'Insurance' includes...contracts of guaranty or suretyship entered into by the guarantor or surety as a business and not as merely incidental to a business transaction." Thus, surety bonds fall within the realm of the insurance regulations based on the *circumstances in which* they are issued.⁸

The Code expressly declines to regulate the ability of two parties contracting a business deal to issue, *as part of their transaction*, bonds or other forms of financial security to each other. Thus it is possible to find within the Utah Code numerous sections

⁷ On the eve of his closing, Posner *altered* the amount of his seller financing on addendum No. 9 of his REPC from \$260,000 to \$263,900. (See Addendum #3, Appellant's brief.) Posner never stated in writing, anywhere, that he approved a \$260,000 Financial Guarantee yet his REPC clearly requires a \$263,900 surety bond. This absence of written approval substantiates Posner's argument that he never approved the Financial Guarantee.

The fact that Posner initialed the \$263,900 change, as Equity states, "**after** Strachan had closed his side of the transaction and **after** American Natural Resources had executed the Financial Guarantee" is not significant. Posner made this change pursuant to Strachan's request, so this alteration was not a unilateral change, as Equity claims (Equity's brief p. 21-22).

⁸ Appellant's brief should have cited this basic distinction.

which do not make any reference to 31A (such as those upon which Equity relies), yet which state that various entities may issue bonds. The operating, although tacit, assumption in these provisions is that such bonds are issued *incidental to a business transaction*.

Contracts of guaranty or surety issued by entities *in the business* of issuing bonds or guarantees are treated by the Code *as insurance*. Such businesses do not fall within the 80(b)(ii) exception because they are, effectively, third parties to someone else's business transaction. In *Surety Underwriters v. E & C Trucking*, 10 P. 3d 338, 342 (Utah 2000), the Utah Supreme Court recognized this distinction, finding that a general indemnity contract issued to Surety Underwriters by E & C Trucking was incidental to the business contract *between* E & C and Surety and therefore not insurance. The contract between E& C and Surety included the arrangement that a third party, Certified Surety Group, would issue a \$50,000 bond if E & C gave Certified consideration. The Court found that the \$50,000 bond which E & C obtained from Certified in favor of ComData, the business which paid E & C's drivers, *was* surety insurance: "Certified's act of issuing the bond and collecting the required consideration, including the general indemnity agreement, was, for Certified, central to its business" *Id.*

It is clear from the nature of the regulations, for example minimum capital surplus requirements for surety insurers listed in §31A-5-211(2)(b)(ii) or the right of the insurance commissioner to assess the financial condition of a surety insurer (§31A-20-105), that consumer protection is one of the principal purposes for this provision.⁹ Without such protection, anyone could start a business such as the one which issued the worthless Financial Guarantee in this case.


⁹ See generally Utah Code Title 31A, Chapter 20: Underwriting Restrictions.

The instant case falls within Title 31A because Posner did not seek the buyer's personal financial guarantee. Posner required a surety bond precisely because he did not want to rely on the buyer's promise to pay. Thus the REPC required a surety bond in the amount of Posner's seller financing, issued by a licensed, insured third party in the business of issuing such bonds. As explained above, a surety bond issued in these circumstances is considered a form of insurance and must comply with Title 31A. The company which issued the Financial Guarantee was not licensed by the state of Utah to issue surety bonds, and the Financial Guarantee was therefore illegally issued and not a valid surety bond.

CONCLUSION

Ms. Christoffersen's instructions to Equity to close exceeded any authority Mr. Posner granted to her, as *written* approval of the change to Posner's REPC was required either from Posner or from an agent authorized *in writing* by Posner prior to closing. Appellant therefore respectfully requests this Court to find the trial court's ruling that Kandis Christoffersen acted within her authority incorrect as a matter of law, and to reverse the trial court's grant of summary judgment on this basis, remanding for further proceedings consistent with this ruling.

Submitted this 6 day of February, 2006.



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CERTIFICATE OF SERVICE

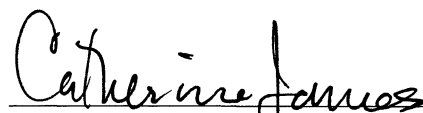
I hereby certify that on this 6 day of February 2006, I caused to be delivered eight true and correct copies of the foregoing **APPELLANT'S REPLY BRIEF** (Appellate Case No. 20050556-CA) to the Utah Court of Appeals, 450 South State Street, Salt Lake City, Utah 84114.

I hereby certify that on this ____ day of February 2006, I sent two true and correct copies of the foregoing **APPELLANT'S REPLY BRIEF** (Appellate Case No. 20050556-CA) via first class U.S. mail to:

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