2006

John York and Lisa York v. Tom Heal Commercial Real Estate, Inc., and Walker and Company Real Estate : Reply Brief of Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

JOHN YORK and LISA YORK: Defendants/Appellants, vs. TOM HEAL COMMERICAL REAL ESTATE, INC., and WALKER & COMPANY REAL ESTATE Plaintiffs/Appellees.	Case No. 20060237-CA

REPLY BRIEF OF APPELLANT

AN APPEAL FROM JUDGMENT IN FAVOR OF THE APPELLEE, IN THE FOURTH JUDICIAL DISTRICT COURT IN UTAH COUNTY, UTAH, THE HONORABLE ANTHONY W. SCHOFIELD PRESIDING

STPEHEN QUESENBERRY
J. BRYAN QUESENBERRY
Hill, Johnson & Schmutz. L.C.
3319 North University Avenue
Provo, Utah 84604
Telephone: (801) 375-6600
Attorneys for Appellees

DONALD E. McCANDLESS
THOMAS J. SCRIBNER
Scribner & McCandless, P.C.
2696 N. University Ave., Suite 220
Provo, Utah 84604
Telephone: (801) 375-5600
Attorneys for Appellants

IN THE UTAH COURT OF APPEALS

JOHN YORK and LISA YORK: Defendants/Appellants, vs. TOM HEAL COMMERICAL REAL ESTATE, INC., and WALKER & COMPANY REAL ESTATE Plaintiffs/Appellees.	Case No. 20060237-CA

BRIEF OF APPELLANT

AN APPEAL FROM JUDGMENT IN FAVOR OF THE APPELLEE, IN THE FOURTH JUDICIAL DISTRICT COURT IN UTAH COUNTY, UTAH, THE HONORABLE ANTHONY W. SCHOFIELD PRESIDING

STPEHEN QUESENBERRY
J. BRYAN QUESENBERRY
Hill, Johnson & Schmutz, L.C.
3319 North University Avenue
Provo, Utah 84604
Telephone: (801) 375-6600
Attorneys for Appellee

DONALD E. McCANDLESS
THOMAS J. SCRIBNER
Scribner & McCandless, P.C.
2696 N. University Ave., Suite 220
Provo, Utah 84604
Telephone: (801) 375-5600
Attorney for Appellants

ALL PARTIES TO THE PROCEEDINGS

Pursuant to Rule 24 (a)(1) of the Rules of Appellate Procedure, the following are parties to the proceedings:

1. Appellants (Hereinafter "defendants"): John York and Lesa York.

2. Appellees (Hereinafter "plaintiffs"): Tom Heal Commercial Real Estate, Inc., and Walker & Company Real Estate.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

ARGUMENT

The brief of Appellees (hereinafter "Heal") does not address the key issues set forth in Appellants' (hereinafter "York") argument. This case is about contract interpretation. Specifically it is about the interpretation of the parties' Modified Listing Agreement, and more specifically about the interpretation of a single phrase in the Modified Listing Agreement. That phrase makes York liable for a second 6% commission in the event that the property is "sold to a tenant" within 180 days of the expiration of a lease procured by Heal, after having already paid a first 6% commission.[1]

The trial court did not err in its findings of fact,[2] but erred in a conclusion of law, namely the interpretation of the phrase "sold to a tenant" in paragraph 2 of the Modified Listing Agreement. The main thrust of the trial court's findings of fact were that York sold the property to Alpine School District and Alpine School District made an installment sale agreement with MATC. York does not dispute these facts, but instead emphasizes that the trial court never found that *he* sold the property to a tenant, and asks this court to determine whether the phrase "sold to a tenant" in the Modified Listing Agreement makes him liable to pay a commission on a sale he did not make.

---

1 The Appellee's Brief, page 18 tacitly suggests that Heal was unrewarded for his efforts. However, paragraph 2 of the Modified Listing Agreement states that "[i]n the case of a lease of the Property, the commission shall be the commission percentage [6%] times the aggregate of all lease payments during the full term of the lease." (Trial exhibit 3, paragraph 2) There is no dispute that a 6% commission was paid by York for MATC's 11 year lease. Thus, Heal was fully rewarded for its procuring the lease to MATC

2 Appellee's brief refers to "York's scattered titles and descriptions of its appeal," referring to the cover page of Appellant's brief, which suggests that York appeals a ruling on summary judgment and that York appeals the court's findings of fact However, the text of Appellant's brief makes it clear that York appeals neither the trial court's findings of fact nor the ruling on summary judgment Any suggestion otherwise was Defendants' clerical mistake.

In Point I below, York addresses Heal's first argument on appeal, that York should have marshaled the evidence, and his appeal therefore must be dismissed. The problem with this argument is that York was not required to marshal because York is not challenging findings of fact.

In Point II below, York points out that Heal overstates the trial court's findings of fact to bolster its argument that York should have marshaled the evidence. On pages 15-16 of the Brief of Appellee, Heal misstates the trial court's findings of fact to include a finding that York *himself* sold the subject property to a tenant, and impliedly argues that the trial court concluded that Alpine School District never had an interest in the Property, but financed a transaction between York and MATC. Close examination of the findings of fact, conclusions of law and ruling demonstrate that the trial court never made such a finding or conclusion, and neither should this court.

In Point III below, York argues that Heal's arguments, like the trial court's analysis, is altogether too simplistic – essentially, that York sold the property to Alpine, Alpine sold the property to tenant MATC, therefore the property was "sold to a tenant" and York should pay a commission – begging the question of what the parties intended the phrase "sold by a tenant" in that clause to mean. It is Yorks' position that Heal's argument and the trial court's analysis are too simplistic because they fail to apply the principles of contract interpretation as adopted in Utah law.

Yorks will not elaborate on the arguments set forth in their prior brief that the sale from Alpine to MATC was invalid as it was only addressed by Heal in a footnote, and was adequately argued in the prior brief.

I. YORK IS NOT REQUIRED TO MARSHAL THE EVIDENCE BECAUSE YORK IS NOT CHALLENGING ANY OF THE TRIAL COURT'S FINDINGS OF FACT.

Heal mistakenly states that York is required to marshal the evidence. "*A party challenging a finding of fact* must first marshal all record evidence that supports the challenged finding." Rule 24(a)(9), Utah Rules of Appellate Procedure (emphasis added). However, when an appeal is based on questions of law alone, there is no such duty. York intentionally did not marshal any evidence, because "Defendants do not dispute the trial court's findings of fact and do not dispute the majority of the trial court's conclusions." (Def.'s App. Brief at 9.)

York's appeal is focused on a single question of law – the interpretation of the phrase "sold to a tenant" in paragraph 2 of the Modified Listing Agreement, as applied to the facts found by the trial court, which facts York does not dispute. The Utah Supreme Court is clear that "'questions of contract interpretation not requiring resort to extrinsic evidence' are matters of law, which we review for correctness." *Fairbourn Commer., Inc. v. Am. Hous. Ptnrs., Inc.*, 2004 UT 54, ¶ 6, 94 P.3d 292, 294 (Utah 2004), citing *Zion's First Nat'l Bank, N.A. v. Nat'l Am. Title Ins. Co.*, 749 P.2d 651, 653 (Utah 1988).

In support of its claim that York is appealing facts, Heal mixes up the trial court's findings of fact and its conclusions of law, although the trial court properly keeps them separate. Heal claims on pages 13-14 of his Appellee's Brief that York "appeals the

finding that the Property was sold to a tenant. . . . York appeals a finding of fact it concedes." (Appellee's Brief at 13-14, emphasis added). However, Heal cites no such finding of fact. Instead, Heal cites the court's finding of fact that "Alpine School District purchased the property for $2,656,000 then entered into a lease-purchase agreement with MATC . . .," which York does not dispute. *Id.* Heal also cites one of the trial court's conclusions of law (not a finding of fact), namely that "the lease-purchase agreement between Alpine School District and MATC was, in form, an installment purchase by MATC from Alpine School District," *id.*, a legal conclusion which York also does not dispute. Thus, York is not saying Alpine School District did not purchase the Property; York is not saying that Alpine did not then enter an installment sale contract with MATC; rather, York is saying that *he himself* did not sell the Property to MATC. York's position on the facts is identical to the trial court's position on the facts.

The trial court would agree with York that the interpretation of the term "sold to a tenant" was a question of law, not of fact. In its written ruling after trial, it began its legal analysis, "[t]he resolution of this matter hangs on one question: Did the sale to Alpine, combined with the lease-purchase agreement between Alpine and MATC, amount to a sale to MATC?" (addendum #3 to Appellant's Brief, page 5). York would add only two words to the trial court's question: Did the sale to Alpine . . . amount to a sale to MATC *by York*? The key consideration for this court is to determine whether a sale to MATC by Alpine should make York liable for a commission under the "sold to a tenant" clause in paragraph 2 of the Modified Listing Agreement.

II. THE TRIAL COURT NEVER MADE A FINDING THAT YORK SOLD THE PROPERTY TO TENANT MATC.

The trial court never made a finding or a conclusion that *York* sold the Property to a tenant, despite Heals' misstatement on page 15 of its Brief of Appellee, that "as the trial court correctly found, York 'sold [the Property] to a tenant." Heal does not cite where this quote comes from, nor is there any such statement in the trial court's Findings of Fact, Conclusions of Law, or Ruling. It is possible that Heal means this quote to come from the phrase "sold to a tenant" in the Modified Listing Agreement, inserting "York" and "[the Property]" into the quote to bolster its position. However, Heal's statement constitutes wishful thinking, but does not constitute a finding of the trial court.
The findings of the trial court make it clear that York sold the property to Alpine School District, despite Heal's statement that on page 16 of its brief that "Alpine never had an interest in the Property, vested or unvested," something the trial court never concluded. Instead, the trial court concluded that "Alpine purchased the Property for $2,656,000 and then entered into a lease-purchase agreement with MATC." (addendum #3 to appellant's brief, paragraph 17).

Although the trial court did conclude that Alpine acted as a financier, the trial court never stated nor implied that Alpine financed a transaction between York and MATC, but clearly meant that Alpine acted as a financier of its own installment sale to MATC. On pages 8 through 10 of its Ruling, contained in addendum #3 of the prior memorandum, under the heading, "The lease between Alpine and MATC was in fact an installment sale to MATC," the trial court cites the Utah Supreme Court's statement that

"[i]t is the duty of this court to look to substance rather than to form," *MacKay v. Hardy*, 896 P.2d 626, 629 (Utah 1995) and concludes that "the lease between Alpine and MATC should be treated as an installment sale to MATC. Alpine's role in that transaction is that of a financier." Here, the trial court made no mention of York, because York was not involved in this transaction, and was careful to treat the sale from York to Alpine and the installment sale between Alpine and MATC as two separate transactions. This court should decline Heals' invitation to blend two transactions that the trial court kept separate.

III. THE APPELLEE'S BRIEF DOES NOT JUSTIFY THE TRIAL COURT'S CONCLUSION THAT THE TERM "SOLD TO A TENANT" IN THE LISTING AGREEMENT INCLUDES A SALE BY SOMEONE OTHER THAN THE "SELLER."

Yorks ask this court to focus on the interpretation of the one clause at issue in the parties' Modified Listing Agreement, paragraph 2, which states: "In the event the property is sold to a tenant during the term of the lease or within 180 days of expiration of the lease or any renewals thereof, the Seller shall pay to The Company a commission equal to six percent (6%) of the sale price." (Trial exhibit 3 at paragraph 2). This clause is the sole basis of liability for a second commission, despite Heal's subtle implications to the contrary on page 18 of its brief.[3] Yorks are specifically asking this court: Did the parties mean for this clause to apply to a sale by a third party to the tenant?

---

3 Heal appears to argue on page 18 of his brief that he is entitled to a commission based on his "efforts" rather than based upon the contract. Any such implication is a red herring, because Plaintiffs' complaint was pled purely as a breach of contract case. See Def.'s App. Brief at 13 (R. at 25). containing no claims for conspiracy, fraud, or any other doctrine that would give the opportunity to go outside the contract. Defendant does not address this argument further.

In the Brief of Appellant, Yorks argued that the trial court misinterpreted the intent of the parties as to this clause by isolating it, rather than interpreting the contract as a whole, citing the principles of contract interpretation in the *Restatement (Second) of Contracts*.[4] Yorks further argued that the court ignored at least the following points:

1. The purpose of the contract, which is to "Sell, Lease, or Exchange certain real property owned *by Seller* . . . ." (trial exhibit 3, paragraph 1, emphasis added).
2. The first line of the agreement, where York is identified as "Seller."
3. The plain meaning of the word "seller," which is "one that offers for sale."

In short, the trial court's analysis was too simplistic. The Brief of Appellee seeks to justify the trial court's overly simplistic analysis simply by restating it, without addressing the principles of contract interpretation, implying perhaps that those principles do not apply in Utah. Yorks now reply with analogous Utah precedent.

The trial court's (and Heal's) oversimplification of the "sold to a tenant" clause is analogous to other cases wherein one party sought to isolate a clause in a contract, rendering other clauses meaningless. The case law is replete with such cases, but Yorks seek to demonstrate this point by discussing three cases, *Riche v. Jenkins*, 641 P.2d 148 (Utah 1982); *Fairbourn v. American*, 2004 UT 54, 94 P.3d 292 (Utah 2004); and *Frederick May & Co. v. Dunn,* 13 Utah.2d 40, 368 P.2d 266 (Utah 1962).

In *Riche v. Jenkins*, a realtor unsuccessfully sued for a real estate commission. The realtor had procured an offer *three days before* the listing period, and the seller ultimately sold the property to that very buyer *within six months after* the expiration of the listing

4 *See* Brief of Appellant at 6.

period. The realtor sought to isolate a clause in the listing agreement that provided for a commission in the event that "said property be sold . . . . within six (6) months after such expiration [of the listing period] to any party to whom the property was offered or shown . . . ." and ignoring other statements in the contract suggesting that the property must be offered or shown "during the term of the listing." 641 P.2d at 149. The realtor's interpretation was too simplistic, however, and the court held that

> The difficulty with the plaintiff's position is that Giovanni's offer to purchase the property was made on March 15, three days before the listing was signed. . . . *The purpose of the language in the listing agreement quoted above is obviously to protect the broker against the possibility of the seller and a buyer whom the broker has shown or offered the property during the listing, from making an agreement after the listing has expired, thereby capitalizing on the efforts of the broker, but leaving him unrewarded for his efforts.* Here, however, that is not the case since Robert obtained the offer from Giovanni before the listing and he did not obtain it on the strength of the pursuance in the listing.
>
> . . .
>
> *[Plaintiff's] argument runs headlong into an important principle of contract law that contracting parties are at liberty to make whatever agreement they desire and to employ particular words to limit their liability in certain instances.* . . . We are not at liberty to disregard the language chosen by and employed by the parties and broaden the liability in favor of one party at the expense of the other.

Id. at 149-150 (emphasis added).

The analysis in the *Riche* case is highly analogous to the instant case. Both cases involve listing agreements drafted by the realtor. In both cases, there is a 6-month protection period clause that is the basis of the realtor's lawsuit. In the *Riche* case, the 6-month protection clause stated that the seller cannot sell the property to a buyer procured by the realtor. In the instant case, the 6-month protection clause states that the seller

cannot sell the property to a tenant procured by the realtor. In the *Riche* case, the court determined that the parties did not bargain for this clause to apply to buyers the realtor did not procure, even those the realtor procured before the time of the listing; the court determined this by looking to the purpose of the contract. In the instant case, the court should determine that the parties did not bargain for the protection clause to apply to sellers other than the "Seller."[5]

The purpose of the protection clause in the instant case is similar to the one in *Riche*, and is particularly clear in light of the stated purpose of the Modified Listing Agreement, which is to "Sell, Lease or Exchange property owned by the seller." (trial exhibit 3, paragraph 1). The realtor may wish to have protection when a listing contract creates the possibility of a lease as well as a sale. Leases typically result in lower commissions than sales, because the commission is drawn from the monthly lease payments rather than the entire sale price (although that was not the case here)6. Without the protection of some form of "sold to a tenant" clause, a seller might collude with a buyer first to lease the property, paying the realtor a commission only on the first few lease payments, then to sell the property to the same buyer without the aid of the realtor. Thus, the "sold to a tenant" clause protects the realtor in the limited case that the seller initially leases the property in order to avoid the commission.

---

5 It is noted again that York was not involved in this sale, the trial court made no such findings to that effect and Plaintiff has not challenged the lack of findings to that effect

6 Paragraph 2 of the Modified Listing Agreement states that "[i]n the case of a lease of the Property, the commission shall be the commission percentage [6%] times the aggregate of all lease payments during the full term of the lease." (Trial exhibit 3, paragraph 2) There is no dispute that a 6% commission was paid by York for MATC's 11 year lease. Thus, Heal was fully rewarded for its procuring the lease to MATC.

However, the "sold to a tenant" clause is not intended to cover the situation where the seller sells to someone *other than* the tenant, even if that third party subsequently sells the property to the tenant. The seller has no control over such third party action, and if the parties had intended for the protection to cover third party action, they would have said so. As in *Riche*, Plaintiffs' interpretation (that Defendant is liable for such third party action) runs headlong into the principle that the parties are free to bargain as they choose, and that the court may not disregard the language they chose and expand Defendants' liability to include a sale to a non-tenant, who then might sell to a tenant.

In another case, *Fairbourn v. American*, the seller unsuccessfully sought to avoid a real estate commission. After receiving an offer from a buyer procured by a broker, the seller rejected the offer. When the broker sued the seller for a commission, the seller sought to avoid the commission by isolating a single clause in the contract: Specifically, the seller ignored the clause providing that the seller agrees to pay a commission if the realtor "procures, or presents, an offer to purchase" on the seller's terms, and focused instead on the clause stating that the commission was "due and payable at closing." Since closing had never occurred, argued the seller, no commission ever became due. The Utah Supreme Court declined seller's interpretation which isolated one clause, ignoring another, stating:

> Here, the due and payable clause is unambiguous, so we review the parties' intentions by examining the plain language of the contract. The plain language of the contract indicates that the due and payable clause is merely a timing clause. If instead we give the clause the construction urged by American, the provision for earning commission would be meaningless. [The promise to pay a commission] would have no meaning because the

> due and payable clause would completely control the earning of commission. *We cannot ignore American's promise to pay commission upon procurement of a buyer because we must give effect to each contractual provision.*
> 2004 UT 54 ¶ 11, 94 P.3d at 295 (emphasis added).

The *Fairbourn* case is analogous to the instant case because the broker in the instant case seeks to broaden the impact of the "sold to a tenant" clause similar to the way the seller in *Fairbourn* sought to broaden the impact of the "due and payable at closing" clause. Just as the seller in *Fairbourn* interpreted the "due and payable at closing" clause to create a second condition precedent that would have defeated the purpose of the promise to pay commission upon procurement of a buyer, the broker in the instant case is interpreting the "sold to a tenant" clause to create a commission in a way that provides a commission when someone other than the seller sold the property to a tenant, ignoring the clauses that suggest that seller should not be liable when he himself does not sell the property to a tenant. This court should not allow Plaintiffs to broaden Defendants' liability bargained for in the contract by providing a commission for a sale not made by seller.

Finally, in *Frederick May & Co. v. Dunn*, a stock broker unsuccessfully sought to recover a commission, where the broker had negotiated with a potential buyer, who was unable to obtain financing from a certain financier to buy the property; the seller, unable to sell the property to the buyer, negotiated directly with the financier and ultimately sold the property to the financier. 13 Utah 2d at 41, 368 P.2d at 267. The problem with the broker's case was that the broker ignored the fact that there was no "exclusive right to

sell" provision in the listing agreement.7 The Utah Supreme Court held: "A broker's authority to sell property is not exclusive and does not require the payment of the commission to the broker upon a sale not procured by him, unless made so by the contract of employment *in clear and unequivocal terms or by necessary implication*." *Id.* at 43, 368 P.2d at 268 (emphasis added).

The *Frederick May* case is analogous here because in *Frederick May*, the broker sought a commission for a sale *to* someone other than the buyer, and in this case, the broker seeks a commission for a sale *by* someone other than the seller. The Utah Supreme Court in *Frederick May* held that the broker was not entitled to a commission from such a remote sale without "clear and unequivocal terms" in the listing agreement; the court should hold in this case that similar "clear and unequivocal terms" should have been bargained for in the instant listing agreement for York to be liable on a sale by someone other than him. It is also interesting that in both cases, the ultimate buyer appeared in the scene when the broker was negotiating, but only as a financier, not as a potential buyer. Just as the parties in *Frederick May* did not bargain for a commission to the broker when the subject property was ultimately sold to the potential financier, not the buyer procured by the broker, the parties in the instant case did not bargain for a commission when the seller sold the property to a potential financier, not the tenant.

---

7 The agreement in the *Frederick May & Co.* case was oral, and was referred to by the court as a "general listing agreement."

CONCLUSION

In conclusion, Yorks now ask this court: When the parties bargained for language that a commission is due if the property is "sold to a tenant," did they mean that York must be the seller or is that not important? In this case the trial court should have answered that it was important that York be the seller, since he is defined as the "seller" in the contract and since the purpose of the contract is to sell York's property, but instead the court ignored the purpose of the contract. Yorks have cited three Utah cases in support of their argument, arguing by analogy that the trial court's analysis was too simplistic.

Based on the foregoing facts and argument, defendants move this court to reverse the trial court's ruling and find that the subject real property was in fact not "sold to a tenant" within the meaning of the parties' real estate listing agreement, and that therefore a second commission is not owing from defendants to plaintiffs, and to direct the trial court to enter judgment for the defendants, and award them their costs and attorneys fees at the trial level and on appeal based on the provisions of the "Modified Listing Agreement."

RESPECTFULLY SUBMITTED this 26th day of February, 2007.

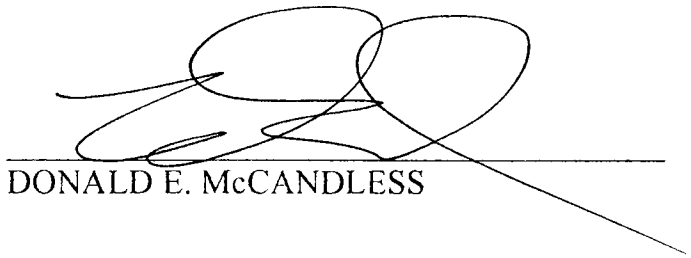
SCRIBNER & McCANDLESS, P.C.

BY: _____
DONALD E. McCANDLESS
THOMAS J. SCRIBNER
Attorneys for Defendant

MAILING CERTIFICATE

I hereby certify that on this 26th day of February, 2007, I mailed, postage prepaid, two accurate copies of the foregoing Appellant's Brief to:

STPEHEN QUESENBERRY
J. BRYAN QUESENBERRY
Hill, Johnson & Schmutz. L.C.
3319 North University Avenue
Provo, Utah 84604
Telephone: (801) 375-6600
Attorneys for Appellee



DONALD E. McCANDLESS