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Kay Berger Inc., Marvin and Marilyn Chernow v. David Hooper and Mansell and Associates : Reply Brief

Utah Court of Appeals

David O. Black; Black, Stith & Argyle, Attorneys for Appellants.
D. Gary Christian; Michael F. Skolnick; Kipp and Christian; Attorneys for Appellee.

IN THE UTAH COURT OF APPEALS

KAY BERGER, INC., MARVIN and MARILYN CHERNOW, Plaintiffs and Appellees,	)	
vs.	)	Case No. 950745-CA
DAVID HOOPER and MANSELL & ASSOCIATES, Defendants and Appellants.	)	Priority No. 15

REPLY BRIEF OF APPELLANTS

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT, STATE OF UTAH
THE HONORABLE FRANK G. NOEL, DISTRICT COURT JUDGE

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STATEMENT OF FACTS

Because Appellees have, in their brief, for whatever reason confused the facts, Appellants set forth the following facts in the matter before the court:

1. The buyers, Marvin and Marilyn Chernow, were represented by Kay Berger, Inc. with a regard to their search for a home to purchase. (Amended Complaint, ¶4; ROA at 17.)

2. Kay Berger, Inc. and Marvin and Marilyn Chernow (Buyers), Appellees, submitted an earnest money agreement to the Sellers through David Hooper (Appellant) a real estate agent affiliated with Mansell & Associates (Appellant). (ROA at 17-18.)

3. The offer submitted by appellees was a full-price offer. Because it contained conditions, the earnest money agreement submitted by buyers was a counter-offer to the sellers unilateral offer to sell as set forth in the multiple listing agreement. (ROA at 17-18.)

4. Originally, one of the sellers (the husband) executed the earnest money offer accepting the buyers counter-offer. (ROA at 17-18.)

5. Very shortly thereafter, the remaining seller (the wife) decided not to execute the earnest money agreement. (ROA at 19.)

6. There is no evidence one way or another as to the reason that the wife (seller) determined not to execute the earnest money offer. (ROA at 19.)

7. The appellees and the court below, have conveniently filled in that blank and argued that the wife of the seller did not sign the earnest money agreement because she had not signed the multiple listing agreement. (ROA at 171-73; Appendix 2.)

ARGUMENT

I.

No evidence exists as to the issue of why the seller's wife refused to execute the Earnest Money Agreement.

The appellees argument that appellants are liable for a sales commission because appellants did not obtain the sellers' wifes' signature on the multiple listing agreement is both a non-sequitur and a red-herring. To determine what all of the parties rights and duties are in the transaction, it is essential to decide factually why the transaction failed. In the case before the court, because the matter was not permitted to go to trial on the issue, there is no evidence as to why the transaction failed. At a very minimum, for appellees to prevail, they would have had to show evidence, through affidavit or otherwise, that the sellers refused to complete the earnest money agreement as a result of the appellants' (Hooper & Mansell) failure to obtain the seller's wife's signature on the multiple listing agreement.

Even if the appellants had been required to obtain the seller's wife's name on the multiple listing agreement (which is not the case (See *Guillotte v. Pope & Quint, Inc.*, 349 So.2d 62 (Ala.Ct.App. 1977); *Woodworth v. Vranizan,* 539 P.2d 1055, 1058 (Ore. 1975); and *Greer v. Kooiker,* 253 N.W.2d 133 (Minn. 1977)) appellees would still be required to show that the absence of the signature was the reason for the sales' failure, that in fact the seller's wife's signature was not required on the multiple listing agreement. That evidence does not exist. This is as much a case of no evidence as it is one of disputed, controverted factual issues. Apparently, appellees assume that the only reason the sale would not have gone forward was because of a lack of a multiple listing signature by the seller's wife. (Such assumptions are never warranted under Rule 56.)

Hypothetically, and aside, there could have been numerous reasons why the sellers decided not to go forward which would have undoubtedly come out at the trial of this matter. Some examples are:

1. The buyer submitted a counter-offer which included conditions that each of the sellers did not agree with;

2. The sellers decided they had not asked enough money for their house and did not want to go through with the sale; or

3. The sellers decided they wanted to continue to reside in their residence.

If in fact the buyers believed they had submitted a full-price offer, without conditions, that was enforceable, the law is very clear in Utah and in other jurisdictions that buyers could have sued sellers to enforce their acceptance of the unilateral offer and enforce the agreement. It is curious that the sellers are not parties to the lawsuit before this court. The only logical reason that the sellers were not made a party to the lawsuit is that buyers were not sure they wanted to go through with the sale or were not sure they had submitted an actual acceptance of a unilateral offer and desired to buy another house which they ultimately accomplished.

II.

A real estate agent is not a guarantor or sale.

Under the unanimous case law of every jurisdiction which has decided the issue, the appellants were not required to get both of the owners' signatures on the multiple listing agreement. (See *Guillotte v. Pope & Quint, Inc.*, 349 So.2d 62 (Ala.Ct.App. 1977); *Woodworth v. Vranizan,* 539 P.2d 1055, 1058 (Ore. 1975); and *Greer v. Kooiker,* 253 N.W.2d 133 (Minn. 1977) The courts have consistently stated that once one of the owners signs, they warrant or

guarantee that the other will sign, and that he has authority to list the property. The appellees have failed to establish in any manner the exact reason why the sale did not go forward and have failed to establish the purpose that the sale failed. Under such circumstances, the logical extension of appellees argument is that the realtor/appellant becomes a guarantor of all sales. In this case, the further extension of appellees' argument is that appellants would have been required to sue their client to enforce what the appellees thought were the terms of a binding contract. Clearly, no such requirements exist on realtors.

III.

Factual disputes exist which preclude Summary Judgment.

Appellants argue vainly that there are no factual issues because appellants adopted facts as set forth in appellees' Motion for Summary Judgment. Appellees argue, despite unanimous case law to the contrary, that reasonable reliance is not a question of fact. The questions of fact in this case which prohibit Summary Judgment are as follows:

(a) What were the conditions set out in the buyers' earnest money agreement and were they conditions that amounted to something more than an acceptance of the sellers' unilateral offer to sell as set out in the multiple listing agreement?

(b) Why did the seller refuse to go through with the transaction (was it because the seller had not signed the multiple listing agreement, which would not have been a valid reason to not go through with the transaction (See appellants' brief))?

(c) Could the sellers have enforced the earnest money agreement submitted to the buyers?

(d) Was appellants' "promise" reasonably expected to induce reliance under all

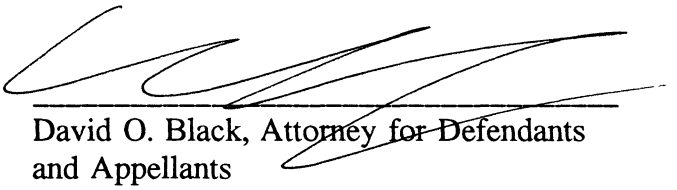
the of the facts and circumstances which appellees submit they were not aware of until prior to the "recision" of the earnest money agreement?

CONCLUSION

Even if the appellants had been required to obtain the signature from the seller's wife on the multiple listing agreement, which is contrary to the unanimous case law in the country, on the record before the court there are inherent unresolved questions of fact with regard to why the transaction didn't close. There is no evidence any where in the record to even suggest that the sellers did not perform because the multiple listing agreement had not been signed by one of the sellers. As a matter of law, the Third Judicial District's decision in this matter, must be overturned and appellees' claims dismissed.

RESPECTFULLY SUBMITTED this 22nd day of January, 1996.

BLACK, STITH & ARGYLE, P.C.



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CERTIFICATE OF MAILING

I hereby certify that on January 22, 1996, a copy of the foregoing Appellants' Reply Brief was mailed, first class postage prepaid, in an envelope addressed to the following named person(s):

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