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Wallace R. Smith dba Smith Realty Company v. C. Taylor Burton : Reply Brief of Respondent and Cross Appellant on Petition for Rehearing

Utah Supreme Court

Vernon Romney; Romney & Nelson; Counsel for Respondent and Cross-Appellant;

Case No. 8302

IN THE SUPREME COURT of the STATE OF UTAH

WALLACE R. SMITH, dba SMITH REALTY COMPANY,
Plaintiff and Appellant,

— vs. —

C. TAYLOR BURTON,
Defendant and Respondent.

REPLY BRIEF OF RESPONDENT AND CROSS APPELLANT ON PETITION FOR REHEARING

VERNON ROMNEY and ROMNEY & NELSON
Counsel for Respondent and Cross-Appellant
404 Kearns Building
Salt Lake City, Utah

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PRELIMINARY STATEMENT

This Brief is filed in reply to the Petition for Rehearing and Brief In Support Thereof, filed by plaintiff and in opposition thereto.

Throughout this Brief, appellant will be referred to as plaintiff, and respondent and cross appellant will be referred to as defendant. All italics are ours.

STATEMENT OF FACTS

In the interest of brevity, defendant respectfully refers the court to the Statement of Facts set forth in his original brief in this matter, for a full recital of the facts involved in this case.

POINTS RELIED UPON.

POINT I.

THIS COURT HAS CORRECTLY APPLIED AND CONSTRUED THE PAROL EVIDENCE RULE IN THIS CASE, IN REVERSING THE JUDGMENT OF THE LOWER COURT AWARDING PLAINTIFF A $2,000.00 JUDGMENT AGAINST DEFENDANT.

ARGUMENT POINT I.

Plaintiff charges that this court has fallen into error in considering the parol evidence rule as a rule of evidence, instead of a rule of substantive law, and implies that the court was unfamiliar with the Utah case of Farr vs. Wasatch Chemical Company, 105 Utah 272, 143 P. 2d, 281.

We assert that this court was dead right in this matter and that its decision is in entire harmony with the holding in the Farr case. It is hard to understand how plaintiff can get such comfort out of the Farr decision, since it in no way supports his theory in this matter. The Farr case and the case at bar are clearly distinguishable on the facts, and the law enunciated in the Farr case only fortifies

this court in its decision in this case. It is there held "The principle that parol evidence is not admissable to contradict, add to, or vary the terms of a written contract. The rule is, of course, well established, but, it has no application here. * * * Here the alleged oral agreement does not in any way attempt to vary or contradict the terms of the written agreement." The court then pointed out that the lease in the Farr case did not purport to deal, in any way, with the matter of making the premises ready for occupancy, but only had to do with the rental and care of the premises after occupancy. It allowed oral evidence regarding the agreement of the landlord to make repairs before the tenant took over, but it rejected oral testimony regarding an elevator, since the agreement required the tenant to keep the premises in repair after occupancy, and the court held that "if a particular element of an alleged extrinsic negotiation is dealt with at all in a writing, presumably the writing was meant to represent all of the transaction on that element, and parol evidence is inadmissible thereon."

In the Farr case there was no mention, whatever, in the lease, of the matter as to which parol evidence was admitted. It was an entirely different matter, not expressly nor impliedly covered by the writing. We have no fault with that holding on the facts involved.

But our case is something else again. We have our subject covered in Exhibit 7 namely, a commission to be paid plaintiff. It is an integrated agreement, complete, clear and unambiguous. Within its

four corners are found the entire agreement of the parties on the subject covered. It was entered into by two experienced business men of more than ordinary intelligence. Smith, especially, is a veteran real estate salesman, accustomed to making all sorts of unusual commission agreements, according to his own testimony. He testified that defendant had no money and would only agree to the Toone exchange on the basis of the commission agreement set forth in Exhibit 7. Plaintiff very much wanted to get a deed to his duplex, which he could do only when the remaining two duplexes were disposed of and he felt sure he could rent the pasture. He had plenty of reason and motive to enter into this contingent fee agreement. For a more full discussion of this being a contingent fee agreement, and for authorities supporting such view, the court is respectfully referred to Point I of Defendant's Original Brief, beginning at page 7.

Plaintiff states that Exhibit 7 does not cover the contingency which arose, i.e.: That enough money was not received to pay plaintiff $2,000.00 commission. We can't think he is serious in this contention. Plaintiff was entitled only to such commission, if any, as might be affirmatively agreed upon. They approached this subject *affirmatively* by saying that "as my commission * * * I will take one-half of the rental fee * * *." Now it was not necessary to go on and state *negatively*, in substance, "But if no rent is received, I will get no commission." The law implies this negative result. In other words, plaintiff started with no rights to commission from defendant

and became entitled thereto only to the extent provided in this special agreement, and that consisted of one-half of the 1953 rent. There was no rent, hence no commission became due.

Counsel for plaintiff is a man of great experience at the bar, and I feel certain that in contingent fee agreements he has drawn, he has approached the matter in the same manner as was done in this case, i.e.: By stating affirmatively what contingent fee is to be, how payable, etc., but has not gone on to state negatively that if he makes no recovery, he is to get no fee. At least that is my practice and that of many others I know. The thing I am amazed at is that two laymen could, in so few words, write such a clear and complete agreement, leaving nothing in doubt.

On what subject does plaintiff endeavor to have parol evidence considered? Obviously, on the subject of the commission due him. Yet, isn't this the very subject treated in Exhibit 7? Is it a distinct, different or collateral matter? Clearly not! Does plaintiff contend that the thing he seeks to prove by parol evidence would not contradict, add to or vary the terms of a written instrument, which the Farr case, supra, says may not be done? Of course not. As this court so well says. It is the very "antithesis of the plain terms of the memorandum," Exhibit 7. The whole heart, meaning and substance of Exhibit 7 would be destroyed. So far as we are aware, the decisions are unanimous that this cannot be done. The court has no power to write a new contract for the parties, and will not permit parol evidence to

destroy the plain, clear agreement of the parties, embodied in writing. At 12 Am. Juris. 749, it is thus stated:

> "Interpretation of an agreement does not include its modification or the creation of a new or different one. A court is not at liberty to revise an agreement while professing to construe it. Nor does it have the right to make a construction for the parties."

Whether the parol evidence rule be considered one of evidence or of substantive law, all courts would reject the offer of plaintiff's parol evidence in this case, since it would completely alter a written instrument, which speaks on the same subject and which obviously was intended as the agreement of the parties. The courts have said that if parol evidence is conditionally admitted to show the conditions surrounding the making of a written instrument, and, is found to vary, modify or add to the terms of the writing on the same matter, such parol evidence will be rejected. That, certainly is the case here.

In Fox Film Corporation vs. Ogden Theatre Company, 17 Pac.(2d) 294, 90 A.L.R. 1299, the court has said:

> "In the absence of fraud, or mistake, parol evidence is not admissable to contradict, vary, add to, or subtract from the terms of a valid written instrument which purports to set forth the entire contract of the parties."

To the same general effect see 20 Am. Juris. 958, 963, 968, 989, 990, 991 and 12 Am. Juris. 755, 756, 757, and 758. At page 991 of 20 Am. Juris. is the following:

> "A written agreement dealing with the amount, time and manner of payment is ordinarily conclusively to be presumed to embody all that element of the oral negotiation."

At 12 Am. Juris. 758, is the following:

> "A written contract may properly be varied by an oral agreement only when it is collateral, is not inconsistent with express or implied conditions of the written contract, and is one which the parties could not reasonably be expected to embody in the writing."

Can it be said in this case that plaintiff's offered oral agreement is collateral to the written one and that it is not inconsistent with the expressed and implied conditions thereof and that it is one which the parties could not reasonably be expected to have embodied in the writing? The answer is "no" to each proposition.

One of the best discussions of this whole subject is found in 70 A.L.R. beginning at page 752, where an array of cases from all jurisdictions is assembled.

> "To allow a party to lay the foundation for oral evidence by oral testimony that only part of the agreement was reduced to writing,

> and then prove by parol the part omitted would be to work in a circle and to permit the very evil which the rule was designed to prevent." Thompson vs. Libby, 34 Minn. 374; 26 N.W. 1.

Bearing on the argument of plaintiff that the drawing of Exhibit 8 by plaintiff is evidence of intent of the parties and should be admitted in evidence, we find in Fentriss vs. Steele, 110 Va. 578; 66 S.E. 870, that the court says that parol evidence cannot be admitted to prove a contemporaneous agreement that a written instrument, on its face unambiguous and complete, should be considered only as a basis or outline of a contract to be filled out subsequently with stipulations other than those stated in the writing.

In Dawson County State Bank vs. Durland, 114 Neb. 605; 209 N.W. 243, the court adopts the doctrine that

> "The test of the completeness of a written contract is the writing itself and parol evidence to show that it is incomplete is not competent."

At 70 A.L.R. 759, we find the following: In the New York court in a comparatively recent case (Mitchell vs. Lath, 160 N.E. 646; 68 A.L.R. 239) the court has laid down these conditions which, it is said, must exist before an oral agreement may be shown to vary the written contract, viz: (*1*) *the oral agreement must be in form a collateral one;* (*2*) *it must not contradict express or implied provi-*

sions of the written contract; (3) it must be one that parties would not ordinarily be expected to embody in the writing. See also 12 Am. Juris 758.

Plaintiff in our case not only fails to meet all three of these requirements, but actually meets not a single one of them.

To the same general effect see the pronouncement of the U.S. Supreme Court in Seitz v. Brewers' Refrigerating Machinery Company, 141 U.S. 510; 35 L. Ed. 837, where a written contract is silent as to a particular matter (in this case time of payment), and the law supplies the omission, parol evidence is not admissable to show a particular date for payment alleged to have been agreed upon, since this would be to vary the written contract. Cliver v. Heil, 95 Wis. 364; 70 N.W. 346.

In his second ground for a rehearing, plaintiff cries out loudly that the decision "deprives plaintiff, without any justification of commission which in equity and good conscience were due him and in effect creates a penalty and forfeiture."

One can suffer a forfeiture only of something one has or is legally entitled to. In this case we have conclusively shown that plaintiff did not become entitled to any commission, because he was to be paid only if he rented the pastures, which he failed to do. The simple fact is, the contingency which would entitle him to a commission never occurred and he just didn't qualify for a commission. How then can he accuse this court of depriving him without justification of commissions or of levying a penalty? Does

counsel feel that in an accident case which he has on a contingent fee basis, that he has been deprived *without justification* of a fee, because he does not win his case? Nothing was due plaintiff "in equity and good conscience" unless he became entitled legally to a commission, and this court has rightly decided that he is not so entitled.

This court has not misconstrued or ignored the parol evidence rule or its proper application to this case, as charged by plaintiff, but, on the contrary, has properly applied said rule, as announced, in the Farr case, supra, and other leading authorities, and in so doing has concluded that whether it be a rule of evidence or of substantive law still the admission of the parol evidence to sustain the finding of the lower court would add to, vary and modify the terms of a written agreement, Exhibit 7, and is so inconsistent therewith, that such parol evidence cannot be received under the most liberal construction of said agreement. Therefore the decision reversing the judgment of the lower court is right and proper.

POINT II.

PLAINTIFF'S CLAIM FOR A COMMISSION IS VOID UNDER OUR STATUTE OF FRAUDS, UNLESS HE CAN BRING IT UNDER THE WRITTEN AGREEMENT, EXHIBIT 7.

ARGUMENT POINT II.

As pointed out in defendant's original Brief, plaintiff is stopped at the threshold, by the provisions of our Statute of Frauds, Section 25-5-4, Utah Code Annotated, 1953, which provides:

> "Every agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation"

shall be void unless in writing. An earlier statute, identical in wording, was construed by this court in the case of Case v. Ralph, 188 Pac. 640, as requiring that a real estate broker, if he is to recover at all, must base his claim on a written instrument covering all terms of his employment, showing his authority to sell, the amount, terms, and consideration upon which his commission is to be paid. Under that holding plaintiff must recover, if at all, under the terms of the written agreement, Exhibit 7, and not under the parol agreement which he seeks to prove. This salutary statute was passed to prevent just such an attempt as is here made to claim a broker's commission on flimsy, contradictory, and often poorly remembered parol agreements. It appears that plaintiff is stopped in this case, which-

ever way he turns. If he stays with the written contract, Exhibit 7, as he must do under the law, then he became entitled to no commission and if he attempts, as he is doing, to vary its terms by alleging a parol agreement, then he encounters this provision of our statute which makes void such parol agreement.

POINT III.

NO SUFFICIENT GROUND FOR A REHEARING HAS BEEN SHOWN BY PLAINTIFF AND HIS PETITION THEREFORE SHOULD BE DENIED.

ARGUMENT POINT III.

This court has consistently and repeatedly ruled that to justify a rehearing a strong case must be made. It is thus stated in Brown v. Pickard, a Utah case at 11 Pac. 512:

> "We long ago laid down the rule that to justify a rehearing, a strong case must be made. We must be convinced that the court failed to consider some material point in the case, or that it erred in its conclusions or that some matter had been discovered which was unknown at the time of the hearing. * * * When a case has been fully and fairly considered, in all its bearings, a rehearing will be denied."

To the same effect: In re MacKnight, 9 Pa. 299.

It is put thusly in the Utah case of Ducheneau vs. House, 11 Pac. 618:

> "We have repeatedly called attention to the fact that no rehearing will be granted where nothing new or important is offered for our consideration. We again say that we cannot grant a rehearing unless a strong showing therefor is made. A re-argument, or an argument with the Court upon the points of the decision, with no new light given, is not such showing."

In Cunningham, et al, vis. Scott, et al, 11 Pac. 619, the court observes:

> "A defeated party usually feels that the decision is not good law, but that furnishes no ground for a rehearing."

Judge Frick in the case of Cummings, et ux, vs. Nielson, et al, 129 Pac. 619 in writing the opinion denying a petition for rehearing stated the disposition of this court in the following language:

> "When this court, however, has considered and decided all of the material questions involved in a case, a rehearing should not be applied for, unless we have misconstrued or overlooked some material fact or facts, or have overlooked some statute or decision which may effect the result, or that we have based the decision on some wrong principle of law, or have either misapplied or overlooked something which materially affects the result. In this case nothing was

done or attempted by counsel, except to reargue the very propositions we had fully considered and decided. If we should write opinions on all the petitions for rehearing, filed, we should have to devote a very large portion of our time in answering counsel's contentions a second time; and if we should grant rehearings because they are demanded, we should do nothing else save to write and rewrite opinions in a few cases. Let it again be said that it is conceded, as a matter of course, that we cannot convince losing counsel that their contentions should not prevail, but in making this concession let it also be remembered that we, and not counsel, must ultimately assume all responsibility with respect to whether our conclusions are sound or unsound."

We submit that plaintiff has presented no new points which were not in the original briefs or orally argued to the court in the first instance, and that all points now raised were considered by the court in arriving at its decision. Plaintiff has simply charged, with nothing to support it, that the Court's decision contains a basic misapplication and misconstruction of the Parol Evidence Rule. Yet, the exact opposite is shown by the Court's decision. It points out, in substance, that it has considered the finding of the lower court to the effect that in any event defendant was to pay plaintiff the commission by November 1, 1953, which could be made only on the basis of the parol evidence, and finds that such finding would so vary the terms of the written agreement, Exhibit 7, that it is inadmissible under the

parol evidence rule, whether such rule be considered as a rule of evidence or as a rule of substantive law. This is in line with the undisputed law.

The only other point made by plaintiff is a restatement of his contention, made in his original brief, and orally argued to the court, that he should be given a judgment because he alleges that the fences were not as he would have liked them. This court's decision shows that it has considered this matter, which it correctly disposes of in this language:

> "There was testimony of plaintiff to the effect that defendant failed to repair a fence so that plaintiff could not rent the pastures. Plaintiff did not plead excuse for non-performance but defendant's hindrance or prevention, asked for no amendment of his pleadings to conform to such proof, and the lower court obviously was unimpressed with such theory since it made no finding to that effect.

How can plaintiff say this court ignored the fence question? It clearly did not, but held that plaintiffs' pleadings would not support a judgment on that theory and that the lower court was so unimpressed that it didn't make any sort of finding on it.

Plaintiff himself placed no importance on this theory, because at page 2 of his original brief, he states that his claim consists of "Two Thousand Dollars was claimed under a memorandum agreement which is marked Exhibit 7 * * *," and at page

4 says "The court found that defendant was indebted to plaintiff for the Two Thousand Dollars represented by the memorandum contained in Exhibit 7."

Certainly the lower court's findings are based solely on a construction of Exhibit 7 and on the further finding that it was the understanding of the parties that the commission would be paid in any event by November 1st, which latter finding is, we submit, without a scintilla of evidence to support it. One will search the record in vain for any testimony fixing November 1st as a date for payment. The court made no finding regarding fences or any excuse for non-performance by plaintiff and certainly no judgment could be supported upon any such theory in the absence of any such finding.

CONCLUSION.

It is respectfully submitted that this court properly applied the parol evidence rule in its decision; that plaintiff has failed to show sufficient grounds for the granting of his petition for rehearing, and that same should be denied, and the decision of this court allowed to stand as written.

Respectfully submitted,

VERNON ROMNEY and ROMNEY & NELSON
Counsel for Respondent and Cross-Appellant

Received three copies of the foregoing Brief this ..... day of September, 1955.

RAWLINGS, WALLACE, ROBERTS
& BLACK and DWIGHT L. KING,
Counsel for Appellant.

By .....

Respectfully submitted.