
In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division

In the matter of:) Chapter 13 Case
)
NANCY L. HILLIS) Number 97-42591
)
Debtor)

MEMORANDUM AND ORDER
ON OBJECTION TO CLAIM OF WEFF, INC.

Debtor's case was filed on August 29, 1997. WEFF, Inc., d/b/a Remax of Savannah, filed a claim on December 29, 1997, in the amount of \$47,940.00. Debtor objected to the claim and the matter was heard on May 26, 1998. Based on the evidence presented, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

At the time of filing, Debtor owned a renowned piece of property in historic Savannah known as the Hamilton-Turner Mansion, which the Debtor converted into a museum catering to the tourist industry. Because of financial problems, Debtor determined that she must sell the home, which was originally purchased by her ex-husband for slightly over \$400,000.00 and sold to her in April 1996. On August 26, 1996, she hired Doug Blanton, a realtor located on St. Simons Island, Georgia, to list the property at \$1.2 million. Blanton associated Ellis and Cindy Cook, then with Coldwell Banker Realtors of Savannah, as co-brokers of the property.

While some very low verbal “offers” were received concerning the property, no written contract was extended and the listing expired on February 26, 1997. The listing agreement was not renewed. Sometime after the listing agreement expired, Ms. Cook, then associated with Remax, contacted the Debtor and informed her that she had potential purchasers for the property who would like to see it. Cook urged the Debtor to reduce the asking price and reveal the “bottom line” figure that she would accept. The Debtor agreed to reduce the asking price to \$799,000.00 and Ms. Cook then presented to the Debtor an “Agreement To Show Unlisted Property To Prospect” (Ex. WEFF-1). Ms. Hillis signed the agreement which provided that Remax, where Mr. and Ms. Cook were then associated in business, could show the property for a period of ninety days, could quote a sales price of \$799,000.00 and acknowledged that Mr. and Mrs. Paul Ruffino of San Mateo, California, were the prospective purchasers (Ex. WEFF-1).

Debtor’s and Ms. Cook’s recollections of the agreement differ on a point which is material to the issue before me. The Debtor, Ms. Hillis, testified that she agreed to the one time listing and to the substantial reduction; however, she also told Ms. Cook that, at that price, she would sell the property, in her words, “bricks and sticks only.” This meant no extras would be included, and she would remove all draperies, chandeliers, beds, and other removable items. Ms. Cook acknowledged that the statement about “bricks and sticks” was made, but testified that the Debtor only added that stipulation to the discussion when an offer, authorized by the Ruffinos, was delivered with an attached “Personal Property Agreement” which, in addition, provided for the sale, for \$1.00, of “all window

treatments, light fixtures and ceiling fans to convey at closing. Canopy bed in downstairs parlor bedroom to remain (built in).” (Ex. WEFF-6 and 7 attached to Ex. WEFF-3 and 4).

The “Agreement To Show” described the subject property as “Lot A of Lot 38, Lafayette Ward, known as 330 Abercorn Street, Savannah, Georgia.” It did not expressly include any personal property. It authorized a sales price of \$799,000.00 “for the property,” and provided in relevant part as follows:

Owner agrees to pay to Broker, at the closing of the sale, a real estate commission (hereinafter “Commission”) six percent (6%) of the sales price should Prospect enter into, during the Authorization Period, an enforceable Purchase and Sale Agreement to purchase the Property, and Owner acknowledges that in such event, Broker shall have been the procuring cause of such sale This agreement is not a listing agreement. It is understood that this Agreement in no way prohibits Owner from selling the Property directly to a buyer other than Prospect. Owner shall retain the right to enter into an exclusive Listing Agreement concerning the Property with any other real estate broker.

(Ex. WEFF-1).

The question presented therefore is whether the Ruffinos’ offer, coupled with Ms. Hillis’ obligation under the Agreement to Show, constituted an “enforceable” sales contract so as to create an obligation to pay a commission.

The Ruffino offer called for the full purchase price of \$799,000.00 with no financing contingency, recited an earnest money deposit of \$20,000.00, which in fact was never tendered by the Ruffinos, and a closing date within thirty (30) days. There were

no special stipulations listed in the contract. As previously indicated, however, attached to the contract was a separate Personal Property Agreement which provided, for the additional sum of \$1.00 consideration, that the Debtor would sell various items of personal property to Paul Ruffino. When the contract was presented to the Debtor, she refused to sign it because of the additional requirement that she sell that personal property. The real estate contract tendered to the Debtor contained a provision in paragraph 15 which reads in relevant part as follows:

If either Purchaser or Seller commits an anticipatory breach or indicates implicitly or actually that such party will not consummate this sale, the defaulting party hereby waives the necessity of tender.

(Ex. WEFF-3). The Ruffino contract was never executed by Debtor and never closed. Instead, the house was subsequently sold to unrelated purchasers by the Debtor, without the intervention of a realtor, for \$810,000.00, which included at least some items of personal property.

The principal items in dispute, consisting of window treatments and a canopy bed in a downstairs parlor bedroom, were described at some length. The mansion is quite large and, as it relates to the issues before the Court, contained expensive custom draperies situated in approximately fifty windows on several stories of the structure, and an impressive canopy bed in the parlor floor bedroom.

The Debtor contends that all the draperies, and the canopy bed, are items of personal property that are removable, do not constitute fixtures which become part of

the real estate, and thus were not encompassed within the scope of the Agreement To Show. Instead, Debtor contends these were separate items which she was under no obligation to sell at the \$799,000.00 listing price. The claimants contend that the items constitute fixtures and that Ms. Hillis was obligated, under the Agreement To Show, to sign the real estate sales contract.¹

The draperies were mostly custom-made and fitted to the windows where they were installed, but the uncontradicted testimony of the Debtor is that most of them had come from other locations and had been remade. Because of the high quality of fabric and the expense associated with making them, Debtor considered the draperies to be quite valuable and intended to remove and reuse them at another time and in another location. The canopy bed in the parlor floor bedroom was not permanent. Although it had been designed to appear as a built-in unit, it could be removed and was not permanently affixed to the residence.

CONCLUSIONS OF LAW

Georgia law provides:

The fact that property is placed in the hands of a broker to sell shall not prevent the owner from selling, unless otherwise agreed. The broker's commissions are earned when, during the agency, he finds a purchaser who is ready, able, and willing to buy and who actually offers to buy on the terms stipulated

¹ At the hearing, WEFF's counsel contended that the personal property contract, which recited a separate consideration of \$1.00, was not interdependent with the real estate contract. WEFF has since withdrawn this argument, however, and no longer contends that Debtor was not also obligated to close on both contracts together. *See* Creditor WEFF, Inc.'s Supplemental Brief In Response to Debtor's Objection to Claim, unnumbered page 3, n1.

by the owner.

O.C.G.A. § 10-6-32. A suit to recover commissions is a suit upon “the contract, either express or implied, between the broker and his principal to pay commissions for services performed by the broker in respect to selling or procuring a purchaser for the real estate.” Knowles v. Haas & Dodd, 70 Ga. App. 715, 718, 29 S.E.2d 312 (1944). The Agreement does not grant Mrs. Cook authority to sell, or make any reference to, chattels or personal property in the Hamilton-Turner Mansion. Mrs. Cook in fact testified that the listing agreement was to sell only the real estate. WEFF argues, however, that because the contract signed by Mr. Ruffino was intended to convey only “realty,” including fixtures, the conditions of the listing agreement were met and WEFF earned its commission. Under Georgia law, “realty” includes “all things permanently attached to land or to the buildings thereon.” O.C.G.A. § 44-1-2(a)(2). “Anything which is intended to remain permanently in its place even if it is not actually attached to the land is a fixture which constitutes a part of the realty and passes with it. . . Anything detached from the realty becomes personalty instantly upon being detached.” O.C.G.A. § 44-1-6(a), (c).

If the Residential Sales Contract included the sale of any personal property, WEFF did not earn its commission when Mr. Ruffino offered to buy the house. “Even a slight variation from the owner’s terms will prevent the agent from recovering.” Schaffer v. G.B. Padgett, 107 Ga. App. 861, 862, 131 S.E.2d 796, 798 (1963) (citing Thornton v. Lewis, 106 Ga. App. 328, 126 S.E.2d 869 (1962)). The Georgia Court of Appeals has held that where the purchase price is acceptable to the seller, but conditions set forth in the purchaser’s offer are unacceptable, the broker is not entitled to his

commission. Batchelor v. Tucker, 184 Ga. App. 761, 762, 362 S.E.2d 493, 495 (1987); *see also* Fourteen West Realty, Inc. v. Lane, 147 Ga. App. 171, 172, 248 S.E.2d 233 (1978) (seller entitled to reject where offered price higher than stipulated); Weldon v. Lashley, 214 Ga. 99, 102, 103 S.E.2d 385, 388 (1958) (seller entitled to reject where variations acceptable but objects to stipulated sales price). Specifically, the Batchelor court flatly rejected an argument that industry standards would excuse a variation in the terms of the sale:

[Broker] countered this argument with the contention that the conditions to which [Seller] objected should not deprive [Broker] of his commission since they are ‘standard in the industry and necessary to protect a purchaser in being able to use the property as contemplated by the offer of sale....’ In essence, it is [Broker’s] argument that the additional conditions proposed by the prospective buyer and rejected by [Seller] were minor and immaterial variations of the listing agreement . . . ‘Proof of an offer by the proposed purchaser to buy on terms not stipulated by the owner will not entitle the plaintiff broker to his commissions.’”

Batchelor, 184 Ga. App. at 762.

The nature of several items as personalty or realty is in dispute: (1) lighting fixtures, or chandeliers, (2) ceiling fans, (3) window treatments, and (4) the canopy bed. Because I find that the canopy bed was personal property of Ms. Hillis, and not a fixture so as to be a part of the realty, it is unnecessary to address the nature of the other items, since the contract which called for the sale of the bed varied from the terms of the Agreement to Show.

Georgia courts use several factors in determining whether an article is personal or real property. First, this Court must look to the degree to which the object has become integrated with or attached to the land. If the object cannot be removed without the real property suffering “essential injury,” the object is considered a fixture. *See Walker v. Washington* (In re Washington), 837 F.2d 455, 456 (11th Cir. 1988). Second, the intention of the parties controls with regard to the nature of the article, even if it is permanently attached. *Id.* at 456-457. Third, there must be unity of title between the personalty and realty. *Id.* at 457. The nature of an item “depends upon the circumstances under which it was placed upon the realty, the uses to which it is adapted, and the parties who are at issue.” *Wolff v. Sampson*, 123 Ga. 400, 402, 51 S.E. 335 (1905); *see also Consolidated Warehouse Co. v. Smith*, 55 Ga. App. 216, 189 S.E. 724 (1937).

Mrs. Cook testified that the bed was “built-in,” and Mr. Cook likewise testified that the bed “appeared to be” built-in. Neither Mr. nor Mrs. Cook ever testified, though, that they had in fact inspected the bed or its manner of attachment in the room. Their testimony was based solely upon the appearance that the bed was part of the room. In fact, the bed was not attached and was not a fixture. Both Doug Blanton and Ms. Hillis testified that the bed was separate and not attached to the house. Ms. Hillis testified that her brother built the bed for her and that the draperies around the bed hung from hooks in the ceiling. I find Mr. Blanton’s and Ms. Hillis’s testimony to be persuasive that the bed, despite its appearance, could be removed without injury or damage to the realty, and that it was not intended by Ms. Hillis to be permanent.

This testimony is supported by the terms of the sales contract that the bed was *not* regarded as a fixture at the time the Ruffinos made their offer. The sales contract includes “all existing light fixtures attached thereto, all plumbing, electrical, water heating, heating and air conditioning equipment therein, also all drapery hardware, ceiling fans, and fencing . . . and included in the sale will be the items of *personal* property listed on the attached *personal* property agreement.” (Ex. WEFF-3) (emphasis supplied). The bed is described in the Personal Property Agreement, which states that the seller agrees to sell the “following described *personal* property . . . canopy bed in downstairs parlor bedroom.” (Ex. WEFF-6) (emphasis supplied). Though the Cooks (or the Ruffinos) may now claim that they regarded the bed as a fixture, their intent at the time that the offer was made is clear. All parties understood that the bed was an item of personal property and described it as such.² Since the sales contract required the conveyance of the bed as personal property, the property to be conveyed varied from the terms set forth in the Agreement To Show. Ms. Hillis was therefore within her right to reject the offer from the Ruffinos and WEFF is not entitled to any commission arising from her refusal to execute the Ruffino contract or her later sale of the house.

ORDER

In consideration of the foregoing IT IS HEREBY ORDERED that the claim of WEFF, Inc., in the amount of \$47,940.00 is DISALLOWED.

² This Court notes that the “Personal Property Agreement” also makes reference to the draperies as personal property, and that the only reference to draperies in the sale contract is to “drapery hardware.” (Ex. WEFF- 3 and 5). Thus Ms. Hillis could also remove the draperies if she wished, but the hooks might arguably have been fixtures.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of July, 1998.