202 Va. 575

Record No. 5189

FILE COPY
Clerk, Supreme Court of Appeals
Richmond, Va.

In the Supreme Court of Appeals of Virginia at Richmond

WILLIAM ROTELLA, INDIVIDUALLY, ETC.

v.

JOSEPH A. LANGE, INDIVIDUALLY, ETC.

FROM THE LAW AND EQUITY COURT OF THE CITY OF RICHMOND

RULE 5:12—BRIEFS.

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a. m.; Adjourns at 1:00 p. m.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 5189

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Thursday the 21st day of April, 1960.

WILLIAM ROTELLA, INDIVIDUALLY AND TRADING AS ETON INN, Plaintiff in Error,

against

JOSEPH A. LANGE, INDIVIDUALLY AND TRADING AS JOSEPH A. LANGE, REALTOR, Defendant in Error.

From the Law and Equity Court of the City of Richmond

Upon the petition of William Rotella, individually and trading as Eton Inn, a writ of error and *supersedeas* is awarded him to a judgment rendered by the Law and Equity Court of the City of Richmond on the 28th day of October, 1959, in a certain action at law then therein depending wherein Joseph A. Lange, individually and trading as Joseph A. Lange, Realtor, was plaintiff and the petitioner was defendant.

And it appearing from the certificate of the clerk of the said court that a suspending and *supersedeas* bond in the penalty of eighteen hundred dollars, conditioned according to law, has heretofore been given in accordance with the provisions of sections 8-465 and 8-477 of the Code, no additional bond is required.

RECORD

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INSTRUCTION NO. A.

The Court instructs the jury that if you believe from a preponderance of the evidence that the Plaintiff, JOSEPH A. LANGE, through his Agent and employee, TED BALDACCI, procured a person who was able, ready and willing to purchase the business owned by the Defendant and known as Eton Inn, on the terms offered by the Defendant, then the Plaintiff is entitled to recover commissions even though the failure to complete the contract is due to default or refusal of the Defendant and you must find your verdict for the Plaintiff and assess his damages against the Defendant in the amount of $900.00.

Given Oct. 27, 1959.

T. E. F.

page 13 } INSTRUCTION NO. 6.

The Court instructs the jury that if you believe from the evidence that the proposed purchasers, furnished by the real estate broker, were unable to buy the property themselves, that they could only have done so by using the property as a basis for a loan, or by getting help from others whose names were not disclosed and from whom it was not shown that they had any authority to make the purchase, such proposed purchaser is not a purchaser ready, willing and able to take the property so as to entitle the broker to commissions even though the broker's contract with the owner of the business did not require an actual sale to entitle him to commissions.

Refused.

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In the Law and Equity Court of the City of Richmond, the 28th day of October 1959.

This day came again the parties, by counsel, and came also the jury sworn in this case, pursuant to their adjournment on yesterday, and after further deliberation returned into Court with a verdict in the words and figures following, to-wit: "We, the jury, on the issue joined find for the plaintiff and assess the damages at $900.00."

Thereupon, the defendant, by counsel, moved the Court to set aside the verdict of the jury on the ground that it was contrary to the law and the evidence, which motion the Court overruled.

Therefore, it is considered by the Court that the plaintiff recover of the defendant the sum of Nine Hundred Dollars ($900.00), with interest thereon to be computed after the rate of six per centum per annum from the 14th day of July, 1958, until the 28th day of October, 1959, and the further sum of $4.00 costs in the Civil Justice Court of the City of Richmond, by the plaintiff expended, with damages upon the aggregate amount thereof to be computed after the rate of ten per centum per annum from the 28th day of October, 1959, until paid, and his costs by him about his suit in this behalf expended.

To all of which action of the Court the defendant, by Counsel, objected and excepted.

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NOTICE OF APPEAL.

PLEASE TAKE NOTICE that William Rotella, the defendant in the above matter, by counsel, appeals to the Supreme Court of Appeals of Virginia from the final judgment entered herein in favor of the plaintiff on October 28, 1959.

WILLIAM ROTELLA
By C. WILLARD NORWOOD
Counsel.

Received and filed Dec. 10, 1959.

Teste:

LUTHER LIBBY, JR., Clerk
By EDW. G. KIDD, D. C.

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ASSIGNMENTS OF ERROR.

The defendant, William Rotella, assigns as error the following actions of the Court:

1. The Court erred in overruling the defendant's motion to strike the evidence introduced for the plaintiff and in not striking out said evidence.
2. The Court erred in overruling the defendant's motion to have the verdict set aside as contrary to the law and the evidence, and in not setting aside the verdict as contrary to the law and the evidence, without evidence to support it, and plainly wrong, and not entering final judgment for the defendant or granting a new trial, and in entering judgment for the plaintiff.
3. The Court erred in refusing each instruction which was refused of those asked by defendant, this assignment being as to each such refused instruction.

WILLIAM ROTELLA
By C. WILLARD NORWOOD
Counsel.

Received and filed Dec. 10, 1959.

Teste:

LUTHER LIBBY, JR., Clerk
By EDW. G. KIDD, D. C.

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AMENDED ASSIGNMENTS OF ERROR.

In addition to the errors previously assigned in the above matter the defendant, William Rotella, assigns as error the following actions of the Court:

1. The Court erred in giving to the jury plaintiff's instruction No. A.
2. The Court erred in refusing to give to the jury the defendant's instruction No. 6 and instruction No. 7.

WILLIAM ROTELLA
By C. WILLARD NORWOOD
Counsel.

Received and filed Dec. 23, 1959.

Teste:

LUTHER LIBBY, JR., Clerk
By EDW. G. KIDD, D. C.

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NOTICE.

To: Nicholas A. Spinella
Attorney for the Plaintiff
303 Mutual Building
Richmond, Virginia.

Please take notice that on the 23rd day of December, 1959, at 9:30 o'clock A. M., or as soon thereafter as counsel may be heard, the undersigned will tender to the Honorable Thomas C. Fletcher, Judge of the Law and Equity Court of the City of Richmond, Virginia, in his Chambers in the City Hall, Richmond, Virginia, a statement of the facts in the above entitled cause, and respectfully ask the Honorable Judge Fletcher to certify the same as a true copy of the evidence presented in the above styled cause.

C. WILLARD NORWOOD
Counsel for the Appellant.

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STIPULATION.

It is hereby stipulated and agreed by and between counsel for the respective parties hereto that the following facts are true and correct:

1. That the trial of the above matter was had by a jury on October 27, 1959, and October 28, 1959.

2. JOSEPH A. LANGE,
testified: That he was the owner and operator of Joseph A. Lange, Realtor, a licensed broker, and that he was the plaintiff in the above matter; during the course of his business as a real estate broker, one of his salesman, Ted Baldacci, turned in to the Company a listing agreement (introduced into evidence and marked "Exhibit 1") bearing date, September 29, 1957, and signed William Rotella, by which the defendant, Rotella, employed Joseph A. Lange, Realtor, to sell his restaurant business at 938 West Grace Street, Richmond Virginia, for $9,000.00 cash. Mr. Lange further testified that after referring this matter to his attorney for collection of commission and sometime after November 22, 1957, he received a telephone call from the defendant Rotella and that Rotella told him that he (Rotella) was ready to settle this sale for $9,000.00 cash and Mr. Lange told him it was too late because Aprahamian had already purchased another business. The letter dated November 22, 1957, from Nicholas A. Spinella, Attorney, to the defendant Rotella was introduced into evidence and marked as "Exhibit 6."

page 24 } 3. TED BALDACCI,
testified: That in 1957 he was employed as a salesman for Joseph A. Lange, Realtor, and that in September, 1957, be obtained the aforesaid listing agreement from the defendant, William Rotella; that the terms of sale were $9,000.00 all cash and that the listing was to run for 45 days from the date of the listing (September 29, 1957); that during his efforts to find a buyer for Rotella's business he contacted a number of people and he finally obtained from

Manuel Aprahamian.

Russell D. Armstrong and Manuel Aprahamian an offer dated November 7, 1957, (introduced and marked "Exhibit 2") to buy Rotella's business for $9,000.00, payable $1,500.00 cash and Rotella was to take back a chattel mortgage for the balance; this offer was rejected by Rotella as it was not for $9,000.00 all cash; that he obtained from the said Russell D. Armstrong and Manuel Aprahamian another offer (introduced into evidence and marked "Exhibit 3") dated November 8, 1957, to buy Rotella's business for $7,000.00 all cash; that this offer was rejected by Rotella as it was not for $9,000.00 all cash; that he obtained from Russell D. Armstrong and Manuel Aprahamian another offer (introduced into evidence and marked "Exhibit 4") dated November 11, 1957, to buy the defendant's business for $9,000.00 all cash, subject to the following provisions: The offer to be binding on the prospective purchasers only if they could obtain an A. B. C. license, a health permit and a five year lease on the building; this offer was rejected by Rotella. A check signed by Russell D. Armstrong, dated November 2, 1957, in the amount of $100.00, was introduced into evidence and marked "Exhibit 5" as a deposit on each of the three offers above mentioned. Ted Baldacci stated that the listing agreement contained the words "3 yr. lease" and the terms of the listing were $9,000.00 all cash. Mr. Baldacci further testified that the same provisions with regard to A. B. C. license, lease, and health permit were included in the two previous offers and that the defendant Rotella did not at any time express any page 25 } objection to those provisions and further that he did not express any objection to those provisions in the final offer dated November 11, 1957, but rejected the offer without stating any reasons for so doing.

4. MANUEL APRAHAMIAN,

testified: That he and Russell D. Armstrong planned to go into business as partners; that he and Russell D. Armstrong signed the three offers referred to above and that Russell D. Armstrong gave to Ted Baldacci the check, dated November 2, 1957, which was first given as a deposit on a business on West Broad Street, Richmond, Virginia; that this deal did not go through and they permitted Baldacci to hold said check as deposit on the intended purchase of Rotella's business; that in reference to the last offer, dated November 11, 1957, signed by him and Russell D. Armstrong, that he, Aprahamian and Armstrong were to borrow $6,000.00 from Aprahamian's father, who had agreed to make the loan, and that as to the

balance of $3,000.00 that he, Aprahmian, would put up $1,-500.00 and that Armstrong was supposed to put up the other $1,500.00. Aprahamian further testified that he had told Rotella that he had had some difficulty before with his A. B. C. license and he did not think that he would be able to get another A. B. C. license; further that he had asked Mr. L. W. Stringer, an A. B. C. Inspector, in the presence of Rotella, if he were not able to obtain a license, could his partner obtain a license in his name; that Mr. Stringer had replied, "No." Aprahamian testified that they would not have bought Rotella's business if they could not obtain a five year lease on the building, if they could not obtain a health permit, and if they could not obtain an A. B. C. license. Mr. Aprahamian further testified that after his offer of November 11, 1957, was rejected he purchased another business known as M & M Barbecue in December, 1957, for the sum of $25,000.00, a cash payment of $6,000.00 was page 26 } made and that he obtained an A. B. C. license. He further stated that he had not made any attempt to obtain a five year lease on Rotella's business or an A. B. C. license or a health permit because Rotella had rejected his offer of November 11, 1957.

At the conclusion of the plaintiff's evidence, the defendant, by his attorney, made a motion to strike the plaintiff's evidence on the grounds that the plaintiff had failed to prove his case in that he had failed to show that the prospective purchasers were ready, willing, and financially able to purchase the business and the plaintiff had failed to show that he had presented to the defendant an offer to buy the defendant's business on the terms and conditions fixed by the defendant. This motion was overruled by the Court and the defendant, by his attorney, objected and excepted to this ruling.

DEFENDANT'S CASE.

MR. L. W. STRINGER,

an Inspector for the A. B. C. Board, testified that he was in the defendant's place of business sometime during the first part of November, 1957 (he didn't remember the exact date) and that Manuel Aprahamian, one of the prospective purchasers, told Rotella that he, Aprahamian had previously had some difficulty with his A. B. C. license and that he did not think he would be able to obtain another license; that he then turned to L. W. Stringer, who heard the conversation, and asked Stringer if his partner could obtain a license even

though he could not. Mr. Stringer's answer was in the negative.

WILLIAM ROTELLA,

the defendant, testified that he was the owner and operator of the business of Eton's Inn located at 938 West Grace Street, Richmond, Virginia; that in September, page 27 } 1957, he signed an exclusive listing giving Joseph A. Lange, Realtor, the right to sell his business on the terms of $9,000.00 all cash. Said listing agreement was to run for 45 days. Rotella admitted that the two offers, already admitted into evidence, dated November 7, 1957, and November 8, 1957, signed by Russell D. Armstrong and Manuel Aprahamian, respectively, were presented to him; that neither offer was for $9,000.00 cash and they were therefore rejected; that on November 11, 1957, Ted Baldacci brought to the defendant an offer for $9,000.00 cash signed by Russell D. Armstrong and Manuel Aprahamian; Rotella testified that he stated to Baldacci that he rejected this offer because Aprahamian had told him that he, Aprahamian, did not think that he could get an A. B. C. license since he had some previous difficulty with the A. B. C. Board, and for the further reason that Rotella himself had never been able to obtain more than a three year lease on the building; that he, Rotella, did not wish to tie up his property for 60 or 90 days pending the outcome of Aprahamian's petition for a license when Aprahamian had expressed doubt that he could obtain the license. Rotella denied that he had had a telephone conversation with Joseph A. Lange and he further denied that he had made a statement to Lange that he was willing to settle the case and sell the property to Aprahamian, on his terms.

Plaintiff's instruction numbered A was given to the jury. The defendant, by his attorney, objected and excepted to the giving of this instruction.

Defendant's instructions numbered 1, 2, 3, and 5 were given to the jury. The plaintiff, by his attorney, objected page 28 } and excepted to the giving of these instructions.

Defendant's instructions numbered 6 and 7 were refused by the Court. The defendant, by his attorney, objected and excepted to this ruling of the Court.

The jury brought in a verdict in favor of the plaintiff against the defendant in the sum of $900.00 and costs.

The defendant, by his attorney, moved the Court to set aside the verdict as being contrary to the law and to the

evidence. The defendant's attorney thereupon stated orally his reasons in support of said motion.

The Court overruled the defendant's motion and entered judgment for the plaintiff. The defendant, by his attorney, objected and excepted to this ruling of the Court.

C. WILLARD NORWOOD
Attorney for defendant, Rotella
412 Mutual Building
Richmond, Virginia.

NICHOLAS A. SPINELLA
Attorney for Plaintiff, Lange
303 Mutual Building
Richmond, Virginia.

Presented to and signed by me this 23rd day of December, 1959.

THOMAS E. FLETCHER, Judge.

* * * * *

PLAINTIFF'S EXHIBIT NO. 1.

House Bung. Semi-Bung. Flat Apt. Family Price
N—80a $9,000.00
Location 938 West Grace—Eton Inn
Lot Story Roof Construction — clear of mtg.
Det. Semi-Det. Row Corner Condition Insu.
Room Baths Floors B.Nook Lav. air conditioned 6½ tons

Rent $150.00—3 yr. lease
$55,000—last yr. licen.
Closed Wednesdays
Basement Heat Tubs Attic
Papered Shades Screens
Plbg. Refrig. Range
Garage Ser. Room W.Strip
7 A. M. to 11—except Friday and Sunday till 12 P. M.
Owner William Rotella
Address 3918 Chamberlayne Ave.
Phone—Home 84-6786 Bus. 5-9593

Mtg. st Curtail Due
" 2nd Payable
Land
Ass.—Bldg. Taxes Ins.
Bus.
St. Car School Sign
Other Details
By 2nd Baddacci Sep. 29, '57
Tenant
Lease Exp. Rent.

(Back)

In consideration of the services to be rendered by the firm of JOSEPH A. LANGE, hereinafter called Agent, and in further consideration of being released from the cost of advertising and other necessary expenses incurred by the Agent, We hereby list with the said agent exclusively and irrevocably for a period of (45) Forty Five days from the date hereof or until this notice has been terminated by a 30-day written notice the property described on the reverse side of this card and agree to pay said Agent as commission 10% of the sale price.

Witness the following signature and seal this 29 day of Sept., 1957.

WILLIAM ROTELLA (Seal)

Griffin
Gilham
Bradshaw
Mutter
Albert Joseph
Russell Armstrong
Manuel Aprahamian

PLAINTIFF'S EXHIBIT NO. 4.

Oct. 27, 1959.

T. E. F.

JOSEPH A. LANGE
Realtors—Insurors
110 N. Eighth Street
Richmond 19, Va.
Dial 3-6191

Member of
Richmond Real Estate Exchange
National Association of Real Estate Boards
Virginia Real Estate Association
Richmond Chamber of Commerce
National Institute of Real Estate Brokers

We or assigns hereby agree to give Nine Thousand Dollars ($9,000.00) payable all cash for the following property Stock, fixtures, trade name, good will, all transferable licenses to Eton Inn at 938 West Grace St. Richmond, Virginia. Pos-

session to be on issuance of A. B. C. License and signing of lease, all fixtures and equipment to be itemized and made a part of this contract.

(Subject to securing a board of health permit and a 5 yr. least at $150 a month being obtained by the purchasers.) provided the title is free from valid objections (subject to any restrictions now on property). Settlement to be made at the office of Joseph A. Lange, Realtors, Agent, on or before when A. B. C. licenses and permit are approved or as soon thereafter as title can be examined and papers prepared, allowing a reasonable time to correct any objections reported by the Title Examiner. Possession of premises subject to lease of present tenant; taxes, interest, insurance and rents to be pro-rated as of day of settlement.

Should either party of this contract fail to comply with terms hereof, party so defaulting agrees to pay Joseph A. Lange, Realtors, Agent, regular commissions on the sale. No verbal agreement is considered a part of this contract but any signed addition shall form a part thereof.

We make a deposition of $100.00 to bind this contract which is to be applied on purchase price or refunded if title is not good or if this offer is not accepted within 1 days.

Witness the following signatures and seals at Richmond, Va., this 11 day of November 1957

....hereby accept the above offer this .....day of ..... 194..and agree to pay Joseph A. Lange, Realtors, Agent, regular commissions on this sale or exchange as per tariff of the Richmond Real Estate Exchange.

RUSSELL D. ARMSTRONG (Seal)
MANUEL APRAHAMIAN (Seal)

A Copy—Teste:

H. G. TURNER, Clerk.

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