

Book 24 Page 165

STATE OF INDIANA     )  
  )ss:  
COUNTY OF HARRISON)

IN THE HARRISON CIRCUIT COURT  
CAUSE NO. 31C01-0403-PL-13

ROGER W. EHALT and  
CAROLYN J. EHALT,  
Plaintiffs

v.

BARRY BREWER,  
d/b/a BREWER AUCTION  
SERVICE,  
Defendant

FILED  
DEC 20 2005

HARRISON  
CIRCUIT COURT

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND JUDGMENT**

The Plaintiffs, ROGER W. EHALT and CAROLYN J. EHALT, and by their attorney, John A. Kraft; and the Defendant, Barry Brewer doing business as Brewer Auction Service, by their attorney, Jerry L. McCullum appear for bench trial upon the issues created by a Complaint filed by the Plaintiffs, Roger Ehalt ("Roger") and Carolyn J. Ehalt ("Carolyn") (collectively "the Ehalts") against the Defendant, Barry Brewer, d/b/a Brewer Auction Service ("Brewer"), and the Answer of Brewer.

Tendered and admitted into evidence were the following:

1. Plaintiffs' Exhibit "1", a Purchase Agreement between the Ehalts and the subsequent at auction, BKW, LLC;
2. Plaintiffs' Exhibit "2", a letter from Lorch & Naville, LLC, on behalf of the buyer, BKW, LLC, to the closing title company, Real Property Title Company; and
3. Plaintiffs' Exhibit "3", a Closing Statement (HUD-1) between the Ehalts and the buyer, BKW, LLC, dated October 28, 2003; and

4. Plaintiffs' Exhibit "4", the Plat Room/Assessor's map of the Ehalts' subject property with notations pertaining to the reserved parcel; and
5. Plaintiffs' Exhibit "5", flyers/brochures prepared by Brewer Auction Service for the final auction date of Saturday, August 23, 2003; and
6. Plaintiffs' Exhibit "6", the original Contract of Sale between Brewer Auction Service and the Ehalts signed only by Roger and Brewer, and dated August 23, 2003; and
7. Plaintiffs' Exhibit "7", the Affidavit of Brewer; and
8. Plaintiffs' Exhibit "8", a summary statement dated August 25, 2003 and submitted by the Brewer to the Ehalts.

And the Court, having heard the testimony and the evidence presented and the closing arguments of counsel and having taken this matter under advisement for the submission of Findings of Fact and Conclusions of Law, and now, being duly advised in the premises, finds as follows:

#### FINDINGS OF FACT

1. The Ehalts owned certain land in Harrison County, Indiana historically known as Sugar Grove containing approximately 58 acres more or less and commonly known as 5969 Highway 111 South, Elizabeth, Indiana ("Real Estate").
2. Through contacts by Carolyn's son Tom Hendrickson ("Hendrickson") Brewer made contact with the Ehalts to conduct an auction on the Real Estate, as Brewer was a licensed auctioneer in the State of Indiana, and subject to the Indiana Code and the Indiana Administrative Code.
3. Brewer first established an auction date for the Ehalts' Real Estate for early August, 2003, and no written agreement existed for the first auction date. Brewer admitted

in his Affidavit (Plaintiffs' Exhibit 7) he entered "into an oral agreement on a handshake" and that he then placed a sign on the Real Estate.

4. Due to problems encountered by Brewer the first auction date was not held and a new auction date was set for Saturday, August 23, 2003, as is evidenced by Plaintiffs' Exhibit 5.

5. Plaintiffs' Exhibit 5 was a narrative description of the Ehalts' Real Estate and also reflected certain personal property would be auctioned on Saturday, August 23, 2003 at "10 AM (fast)".

6. Plaintiffs' Exhibit 5 also stated, "Statements made sale day take precedence over written materials."

7. Although testimony is disputed, the weight of the evidence proved that the Ehalts requested Brewer to except from the Real Estate a tract of land two hundred (200) feet in width on State Highway 111 from the auction ("Excepted Real Estate"), which would be conveyed by the Ehalts to Hendrickson.

8. The evidence is undisputed that the "Excepted Real Estate" was not to be auctioned.

9. Plaintiffs' Exhibit 4 reflected the approximate location of the Excepted Real Estate, which at the time drawn appeared to include real estate on the west side of State Highway 111.

10. The Ehalts discovered through the process, but prior to the auction, that the Excepted Real Estate was only to be on the east side of Highway 111 and was to be two hundred (200) feet in width and run to the Ohio River.

11. Prior to the auction Hendrickson had made contact with Dave Ruckman, a licensed surveyor and met with Gary Walther (who worked for Ruckman) to walk the property to help determine what two hundred (200) feet of real estate would be excepted.

12. Until the day of the auction, Brewer and Ehalts had not entered into a written agreement concerning the auction.

13. On the morning of the auction, according to Brewer a "CONTRACT FOR SALE OF REAL ESTATE AND PERSONAL PROPERTY AT PUBLIC AUCTION" ("Contract") being a form provided by him (Plaintiffs' Exhibit 6) was executed by him as the auctioneer and Roger Ehalt.

14. Brewer was aware on the day of the Auction of the Excepted Real Estate although at what time before the auction he knew is disputed in the evidence presented.

15. Brewer showed he was aware of the Excepted Real Estate and made an announcement the day of the auction advising all bidders that not all of the fifty-eight (58) acres would be sold at auction.

16. Whether Brewer knew "thirty (30) minutes prior to the auction..." as he stated in his Affidavit (Plaintiffs' Exhibit 7) or at a time much earlier, he failed to provide for the Excepted Real Estate in his Contract with the Ehalts (Plaintiffs' Exhibit 6).

17. Brewer claimed he was only to have auctioned real estate, and personal property was not to have been included, and it was put in at the last minute.

18. Brewer's testimony on this issue is not credible as the advertisement (Plaintiffs' Exhibit 5) reflected personal property, "NICE 40's Ford Tractor, brush hog, other implements will be sold IF the property sells. Also, small amount of misc. household."

19. The high bidder at the auction for the Real Estate was BKW, LLC, and the bidder was its sole member, Brian Welsh ("Welsh"), who acknowledged he was aware there was to have been a portion of the Real Estate excepted from the auction to be conveyed to Hendrickson.

20. Hendrickson and Welsh knew of each other and were friends.

21. The winning bid at auction for the Real Estate was One Hundred Seventy-Three Thousand and no/100 (\$173,000.00) Dollars by BKW, LLC, and the same was memorialized in a Purchase Agreement ("Agreement") dated August 23, 2003 ("Plaintiffs' Exhibit 1).

22. The pre-printed Agreement had been prepared for Brewer and supplied by Brewer at the close of the auction

23. Originally the Agreement was handed to Carolyn for completion and she filled in three (3) blanks in paragraph 1 relating to the deposit check of BKW, LLC, but then advised Brewer she did not know what was to be filled in was unfamiliar with the Agreement.

24. Brewer or his personnel filled in all the remaining blanks of the Agreement, and reflected the legal description as "see papers from courthouse."

25. The Agreement makes no mention of the Excepted Real Estate.

26. Brewer claimed he had no duty to deal with the Excepted Real Estate in the Agreement.

27. The Agreement provided for a closing date "no later than Oct 23, 2003."

28. The closing had been established by Brewer to be at Real Property Title Company.

29. Brewer presented to the Ehalts a Summary Sheet (Plaintiffs' Exhibit 8) which summarized the sale, proceeds and costs involved and the amount owed by the Ehalts for his services. Brewer was paid for his services prior to closing and on or about August 25, 2003.

30. There was a disputed issue with one (1) of the tractors at the auction that did not sell, and the Ehalts claimed Brewer wanted to purchase it himself and agreed to pay Two Thousand Five Hundred (\$2,500.00) Dollars with Two Hundred Dollars (\$200.00) down and pay the rest in a month or so, while Brewer claimed he was taking it to see if he could get it sold in another auction.

31. In either instance Brewer took the tractor from the Ehalts a few days after the auction paying only Twenty Dollars (\$20.00) down and paying no more.

32. The tractor was returned to the Ehalts on or about October 13, 2003.

33. On October 23, 2003 the law office of Lorch & Naville by attorney Cary Hurst as attorneys for Welsh and BKW, LLC wrote to Real Property Title Company to inform it BKW, LLC was "ready, willing and able to close."

34. The closing on the Real Estate was established for October 28, 2003 at Real Property Title Company with attorney Ron Culler ("Culler") conducting the closing.

35. At the closing discussion centered around the fact that Welsh had been advised by Michael G. Naville, his attorney, that since the Excepted Real Estate was not in writing in the Agreement he had an enforceable contract to purchase all the Ehalts' Real Estate.

36. The testimony of Welsh as to the advice he received from attorney Naville was received by the Court without objection, and it appeared to be an ultimatum of either close on all of the real estate or nothing.

37. The Ehalts, in reliance on the anticipated closing of the Real Estate, had already purchased another parcel of real estate, and needed to close the Real Estate, and they feared litigation between them and BKW, LLC to enforce the written Agreement.

38. Attending the closing were the Ehalts, Hendrickson, Welsh and Culler, and through a separate agreement Welsh agreed to pay an additional Five Thousand (\$5,000.00) Dollars for the Real Estate so his friendship with Hendrickson would not be damaged.

39. The closing took place between the Ehalts and BKW, LLC and Ehalts conveyed all of the Real Estate including the Excepted Real Estate to BKW, LLC.

40. The additional Five Thousand (\$5,000.00) Dollars paid by BKW, LLC was not considered to operate as any release of Brewer.

41. Brewer was not in attendance at the closing.

42. Culler was also in agreement with the claim of Welsh concerning the writing.

43. Brewer contacted Carolyn the day after the closing by phone to make certain the closing took place and Carolyn advised of the problem with the Excepted Real Estate and the fact it had not been put in writing on the day of the auction. Brewer advised Carolyn he thought that it would all work out between the Ehalts and BKW, LLC since Welsh and Hendrickson were friends.

44. The Ehalts had previously had the real estate appraised prior to the auction, and Brewer had advised of a possible price of Two Hundred Thousand (\$200,000.00) Dollars.

45. The Ehalts were damaged by Brewer for the value of the Excepted Real Estate.

46. Carolyn valued the Excepted Real Estate at Twenty Seven Thousand (\$27,000.00) dollars, based upon the difference between the Two Hundred Thousand (\$200,000.00) dollars as indicated by Brewer and the final sales price of One Hundred Seventy-Three Thousand (\$173,000.00) dollars.

47. Carolyn did not take into consideration the additional Five Thousand (\$5,000.00) Dollars paid by BKW, LLC at closing.

48. Ehalt valued the Excepted Real Estate at Three Thousand and no/100 (\$3,000.00) dollars per acre and, based upon a parcel of 5.6 acres, the amount of damages would be Sixteen Thousand Eight Hundred (\$16,800.00) dollars.

49. Hendrickson valued the excepted Real Estate at "the low end" of Four Thousand (\$4,000.00) Dollars per acre or damages totaling Twenty-Two Thousand Four Hundred and no/100 (\$22,400.00) dollars and at "the high end" of Five Thousand (\$5,000.00) Dollars per acre or Twenty-Eight Thousand (\$28,000.00) Dollars.

50. The Court finds that Plaintiffs intended to except 5.6 acres from the auction and that its fair market value was \$2,983.00 per acre for a total of \$16,704.80.

51. Any finding of fact determined to be a conclusion of law shall be as so determined.

#### CONCLUSIONS OF LAW

1. Brewer, as a licensed auctioneer in the State of Indiana, is governed by I.C. 25-6.1-6 et. seq. and the Rules and Regulations of the Indiana Auctioneer Commission (812 IAC)

2. 812 IAC 1-1-19 provides that all contract agreements or authority to sell shall be in writing and 812 IAC 1-1-33 provides that all agreements concerning auctions be reduced to writing at the earliest practical time.

3. Brewer entering into a written Contract on the day of the sale and only signed by one (1) of the owners of the Real Estate does not meet the standard of licensed auctioneers in the State and is in violation of I.C. 25-6.1-6 et. Seq. and 812 IAC 1-1-1 et. seq.

4. I.C. 25-6.1-6-1 requires a licensed auctioneer to follow all reasonable requests of the owner of real estate sold at auction and to perform his duties in accordance with the highest standards of the auctioneering profession.

5. Brewer acknowledged the request of the Ehalts and Hendrickson relating to the Excepted Real Estate, and even announced the Excepted Real Estate would not be auctioned, but failed to provide any language in his pre-printed form to address the Excepted Real Estate not being part of the auction.

6. While 812 IAC 1-1-20 required no further acts of an auctioneer after conducting the bidding and announcement of the culmination thereof, Brewer, by providing the pre-printed form and filling in the blanks placed himself in a position of liability when he failed to provide for the Excepted Real Estate in the written document.

7. 812 IAC 1-1-20 requires a licensed auctioneer to have an executed contract or agreement with the owner/seller "containing the terms and conditions upon which the licensee receives or accepts the real estate for sale at auction."

8. The fact that Brewer did not sign the original contract until the day of the auction would have allowed for him to provide for the Excepted Real Estate in the Contract (Plaintiffs' Exhibit 6), and his failure to do resulted in damage to the Ehalts.

9. Brewer also breached 812 IAC 1-1-20 when he failed to obtain both of the Ehalts signatures as the owners on the written contract.

10. Brewer's actions fail to meet the standards required by I.C. 25-6.1-6-1, and his breach of the standards damaged the Ehalts.

11. 812 IAC 1-1-43 provides that "[v]iolations of sections....19 through 34, and 38 through 43 of this rule shall be considered professional incompetence...."

12. Brewer actions and omissions as a licensed auctioneer are professional incompetence as a matter of law, and the Ehalts are entitled to a personal judgment against Brewer.

13. Any conclusion of law determined to be a finding of fact shall be as so determined.

#### JUDGMENT

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiffs, Roger W. Ehalt and Carolyn J. Ehalt are hereby granted a personal judgment against Barry Brewer d/b/a Brewer Auction Service in the amount of Sixteen Thousand Seven Hundred Four and 80/100 (\$16,704.80) dollars, the costs of this action and post judgment interest at the statutory rate.

IT IS FURTHER ORDERED THAT this judgment is a final judgment pursuant to the Indiana Rules of Trial Procedure, there is no just cause for delay, and the same shall be entered.

SO ORDERED this <sup>7<sup>th</sup></sup> 20 day of December, 2005.



H. LLOYD WHITIS, Judge  
Harrison Circuit Court

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