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Supreme Court of Texas.
Russell Gaines and Southwest Guaranty Mortgage Corp., Petitioners,
v.
Roger Kelly, Respondent.
No. 05-1092.

December 5, 2006

Appearances:

Joseph Robert Larsen, Ogden, Gibson, White, Broocks & Longoria,
L.L.P., Houston, TX, for petitioners.

Jeffrey S. Davis, Michael J. Rogers, P.C., Cleburne, TX, for
respondent.

Before:

Scott A. Brister, Phil Johnson, Dale Wainwright, Nathan L. Hecht,
Paul W. Green, David M. Medina, Harriet O'Neill, Don R. Willett,
Wallace B. Jefferson, Supreme Court Justices.

CONTENTS

ORAL ARGUMENT OF JOSEPH ROBERT LARSEN ON BEHALF OF THE PETITIONER
ORAL ARGUMENT OF JEFFREY S. DAVIS ON BEHALF OF THE RESPONDENT

JUDGE: Court is ready to hear argument in 05-1092, Russell Gaines and Southwest Guaranty Mortgage Corporation versus Roger Kelly. Court has an announcement is an argument and judgment have reserved time for rebuttal.

ORAL ARGUMENT OF JOSEPH ROBERT LARSEN ON BEHALF OF THE PETITIONER

MR. LARSEN: May it please the Court. The issue before this Court in this commercial case, is whether there is any evidence in record that Mr. Robert Thompson was an agent by Estoppel of Russ Gaines and Southwest Guaranty when negotiating alone. Whether the alleged failure by Mr. Gaines, to correct a reference to Mr. Thompson as his agent is some evidence of agency by Estoppel. Essentially, agency by estoppel, by "estoppel by silence". In this regard, there are really two issues before the Court. One, whether "estoppel by silence" can never be a available in any agency by a estoppel case, essentially double the estoppel, and even assuming a current agency could be establish by "estoppel by silence" whether there is evidence to support its application in this case.

JUDGE #1: Was struck by the conduct of a party share, when there, when, when there is a situation where this person held themself out as an individual place alone?

MR. LARSEN: I, I understand your question your Honor, are you--

asking about Mr. Thompson holding himself back?

JUDGE #1: Yes.

MR. LARSEN: Well, that-- whether that Mr. Thompson make if it-- it has to be the actions in the conduct of principle. As holding Mr. Thompson out, Mr. Thompson can't move himself out as the agent and, and thereby that's not evidence of inherent authority we have in conduct of principle in clothing the reported agent with the DC authority. In this case, it would be DC of authority, they actually negotiate on.

JUDGE #1: And no-- there was no affirmative act by the principal to act we ask to this conduct?

MR. LARSEN: We were.

JUDGE #1: Right, where would that record that seem a clearest where they forms came from? Whether in Southwest forms situate from that.

MR. LARSEN: But the-- I think the record is clear your Honor, that the, that the forms that reviews came from Mr. Gaines. There is testimony in the record, Mr. Thompson testified that he had Southwest Guaranty forms. But there is no testimony that those were the forms that were used, the testimony is of those forms came from Mr. Gaines through Mr. Thompson. In fact, though the testimony is in this-- as an important distinction between DC and the Lockart Insurance case rely on heavily by Mr. Kelly. Mr. Thompson was the, the "best bird dog" is, is how he refer to it. To get this-- the application over to Mr. Kelly had signed and back to Mr. Gaines.

JUDGE #2: But is there any evidence where the unused forms came from that Mr. Thompson had?

MR. LARSEN: No.

JUDGE #1: And there's -

MR. LARSEN: [inaudible]

JUDGE #1: - and there's ...

MR. LARSEN: I'm sorry.

JUDGE #1: To those forms same applications, is that have signature blank for the loan to be approved?

MR. LARSEN: Yes.

JUDGE #1: And the-- that have to those forms have Mr. Thompson as being the Sonny or Southwest or somebody actually with Southwest.

MR. LARSEN: That's a very good question. And the, the form ha-- it was, it was to be signed by Mr. Gaines and, and that's an important distinction between this case and a lot of the insurance agent cases. Because in most cases, those forms specifically reference are re-- in agency relationship is specifically reference the insurance agent as demand position to executethat on behalf of the insurance company, and there's no reference to any agency relationship on this forms. There's only this Southwest Guaranty letterhead. So basically, anytime you have somebody courier document with letterhead or some in issue that it belongs to a ex-company, you run the risk that, that person is basically shuttling the documents, becomes an agent. And particularly in this case, they are trying to make Mr. Thompson in the way general agent that an agent who has add the scope of authority to make the call on alone. ' cause their entire case rest on a comment, but Mr. Thompson that it was a, qoute/unqoute, "done deal". And from that point, they ceased any further attempts to find alternate financing. So that-- they're basically quoting Mr. Thompson with the full authority to negotiate the loan and he never-- and, and this is an important distinction with the wa-- with the Walker case as well, Walker Insurance Services because in, in, in the Walker case, agency was found and the punitive agent was involved in negotiations. And there's a lot

of distinctions between Walker and in fact, Mr. Kelly places a lot of emphasis on the Walker case, of a-- the state admitted to because it, it, it falls in mind but the question is that that are being raised here. In Walker, the punitive agents that eight to ten weeks negotiating and preparing the transaction. Here, there is no evidence that Mr. Thompson was involved in negotiation, only that he was shuttling documents. The contact in the Walker case at all times was with the punitive agent. He was the point man as testified in that case. In this case, Mr. Thompson is referred to as the "bird dog to get things done". In Walker, the plaintiff had to go through to the punitive agent; in this case, some said they've contact with Mr. Gaines. In the Walker case, a principle confirmed his understanding of the punitive agents authority. In this case, there is no confirmation, only the alleged failure to correct a statement that Mr. Gaines was-- excuse me, that Mr. Thompson was the, was the agent of Mr. Gaines in Southwest Guaranty. There's no evidence that Mr. Gaines even heard that statement and then in a estoppel by silence case if that's going to be any evidence that, that firstly who has the duty to speak under an estoppel by silence. Doctrine has to know the facts in order to have the duty to speak and there's no evidence that Mr. Gaines even knew that Mr. Kelly or his lawyer, Mr. Poller with whom most the contact was in this case, thought that Mr. Thompson was the agent of Mr. Gaines. So ...

JUDGE #2: Would you draw a distinction that appear between an agent for delivery and an agent for negotiation?

MR. LARSEN: Yes.

JUDGE #2: Could you explain on that matter.

MR. LARSEN: Well, are-- I mean, the scope of agency is I think very fundamental that was going on in this case.

JUDGE #2: And we don't deny the use of agent for deliver that AA

MR. LARSEN: He-- and he did was deliver the documents. There's no question at that, that he was-- I mean, whatever he-- authority an agent for delivery has that by virtue of delivering documents, I think, what we would add a great deal of uncertainty in risk to doing business in the State of Texas if by simply delivering documents, a person meant the-- it somehow clout with the indecent authority to call the deal to, to settle how the deal goes, then we, we might lined up in the position where you can hand anybody in, in that sort of decision. That you have to deliver the document yourself; that everything has to be in a, in a person of persons kind of a meeting and we-- that's certainly-- that's not what the law is, and I think it would basically I think, Mr. Kelly is, is asking this Court to extend the law. So such that, an agent for delivery would be coming general agent. Again, and, and just to, to go back briefly the Walker case, in the Walker case, the principle accepted the deal that, that agent was-- that there was a ratification and there is no act, there's obviously in a ratification in this case. And it-- and the question is raise about the paperwork, and how Mr. Thompson came about to paperwork, there's no evidence in the record that Mr. Gaines, on behalf of Southwest Guaranty knew Mr. Thompson had any paperwork. And there's no evidence in the record that Mr. Kelly knew that Mr. Thompson had paperwork with Southwest Guaranty letterhead on it, and it wa-- and therefore, it goes to the reliance, it didn't know-- it can't be, it can't be evidence that he-- there can't be evidence that you relied on, at the time he believe that Mr. Thompson was his agent that, that statement, Mr. Thompson's statement that he had forms belonging to Southwest Guaranty, that was in a deposition, years after this, there's no evidence that anybody knew at that time.

Mr. Gaines, Mr. Kelly, Mr. Poller were-- Mr. Kelly's other lawyer, Mr. Stocker, didn't anybody knew that Thompson have paperwork from an earlier deal; we don't know, we don't even know how Mr. Thompson had that paperwork, and there's no evidence in the record, how he got it and-- that he used it for anything.

JUDGE #1: What, what should have Kelly, what, what should have Kelly done if anything if he was told that it was have done deal? Should not have relied on that, that the someone else to confirm if it's a done deal or not or-- what, what should he have done?

MR. LARSEN: Well, there-- that's a, and that's a very good question too, your Honor, because one of the elements in, in a parent agencies is justify the reliance. And what, what Mr. Kelly-- there's no evidence that Mr. Kelly justify that you rely on disputative agency relationship, and therefore the statement made by the punitive agent is, if, if it is a done deal. Mr. Kelly's case hinges on this done deal and he claimed in reliance, he stop seeking alternate-- alternative funding to purchase the property in question; that he had been looking for a funding source for the entire year of 1998. The-- in order the close on this option by years end, the contact with Mr. Thompson in the late November, after having that all year for another alternative source. Mr. Thompson enter a contract with Mr. Gaines. However, there is no evidence in the record that Mr. Kelly, or his lawyers were working with him on this stand. We're talking with any other funding source. At this time, much less that there was a funding source that could give him a deal on similar terms as those he was negotiating with Mr. Gaines in Southwest Guaranty. Mr. Kelly seeking that difference between the deal, he finally windup with, with Eight Diamonds. And the deal he-- would like to have gotten with Mr. Gaines. But the actual taking is negative, he ceased looking for alternative sunding-- funding sources, it, it-- that put you, you know, put there's no evidence he was looking for funding sources. There's no evidence that he actually relied on it, that he see-- that he had a deal set up that, that he could have done in place of what he had going with Mr. Gaines.

JUDGE: On, on what situation were Mr. Kelly be entitled to relief? What, what type of fact scenario 'cause it seems to me, not knowing this industry but I have been limited experienced it, but nothings have done deal unter-- till it gets funded.

MR. LARSEN: Why but certainly I agree with your assertions, your Honor, that nothing is a done deal until it gets funded. I'm not, I'm not-- look there-- I mean, as is-- far as I'm-- I believe that I'm covering Mr. Kelly's position and the deal wasn't done, I would have continue to exercise all my alternatives in terms of trying to get funding for the deal. Instead of, you, you have somebody who simply delivering documents to you and taking them back to Mr. Gaines in Southwest Guaranty to get them executed and this person says, "What's a done deal?" And so you stop looking for other funding and you've got a deadline at the end of the year to try and get a loan in order to close on his option and, and what he says is, I mean his reliance argument is that he stop looking for alternative funding.

JUDGE #1: What if it's a principle that says, "It's a done deal" and for whatever reason, it done and get funded is, is there cause of action there?

MR. LARSEN: Well, if this principle says "it's a done deal", I think then you get into the issue of a promissory estoppel, and, and there you've got a similar reliance sort of an argument if, if Ms.-- let say Mr. Gaines actually said, "It's a done deal" and then Mr. Kelly was here before this Court saying, "Well, as a result of Mr. Gaines

statement, it was a done deal, I stop looking for alternative funding." They've been the Court has to ask "What alternative funding was there? What, what were your other options?" Because that the, the trial Court found and the Appellate Court upheld that there was no contract. So in that case, if your looking at some sort of quasi-contract or promissory estoppel sort of an argument, is to what he actually did in reliance in-- the, the record doesn't have any evidence that he did rely on it. If you look at some of the-- all, all the estoppel cases rely heavily on reliance if, if in fact, you know, they just say what he's told me that, but they can't prove how that effective ultimately what they did. Then, therefore close, there's no remedy because if-- I mean if in this-- if in this case he said, "I was also talking to ex-bank, and ex-Bank was prepared to give me a deal on the same terms."

JUDGE #1: Right.

MR. LARSEN: And as a result of what-- of Mr. Gaines directly time or in this case through the agency of Mr. Thompson. I think we've been in a position say while there's some evidence says, "He could've got this similar deal because he's, he's talking to ex; there's nothing like that in this case." I'm out of time.

COURT ATTENDANT: Time is expired with Mr. Larsen, thank you. The Court is now ready to hear argument from the respondent.

JUDGE: May it please the Court. Mr. Davis to present argument for respondent.

ORAL ARGUMENT OF JEFFREY S. DAVIS ON BEHALF OF THE RESPONDENT

MR. DAVIS: May it please the Court. That lead the Supreme Court said have ask me and say the time for what we hear today on back in 1982 when it state it. It is the all if-- the often interest the person appoint agents as well as for the benefit of the convict that persons deal with agent should be able to rely fairly upon true statements by agents who are purporting the act and are purely acting in the interest of question.

JUDGE #2: What evidence is there that Southwest Guaranty held-out Robert Thompson as it's agent?

MR. DAVIS: I think we have to look at two different agencies to get to that form. One, we have agency relationship between Robert Thompson and Roger Kelly, and the other would to Robert Thompson and Russell Gaines. Enclosing Court and that is there was an advisory fee agreement between Robert Thompson and, and Roger Kelly.

JUDGE #1: I'm sorry, there was what?

MR. DAVIS: An advisory fee agreement wherein Robert Thompson said out, he was going to go and obtain and negotiate alone for-- on behalf of Roger Kelly. That set of provision relationship, that set an agency relationship. As a part of that relationship, and I think we get in to this "estoppel by silence" issue that has been raised by, by counsel in, in the briefing. Under that relationship, Robert Thompson had a duty to advice Roger Kelly at the end of relationships he, he obtain and he advice Roger Kelly of that relationship that he intervene with Russell Gaines that he was now acting in a dual agency has being with Russell Gaines. On [inaudible]

JUDGE #2: Where, where, where, where is that evidence?

MR. DAVIS: That is in ...

JUDGE #2: That believes he was in a dual capacity.

MR. DAVIS: That is simply does in the update of Roger Kelly.

JUDGE #2: Okay. Well, regardless of what Thompson said, the matter saying is we have to look at what Gaines set up, what Southwest Guaranty said in terms of the apparent authority of it's agent. Is that-- did you bring as that?

MR. DAVIS: Yes, your Honor.

JUDGE #2: And so what evidence is there from Southwest Guaranty -

MR. DAVIS: Well, ...

JUDGE #2: - or Gaines as they held him out, they clothe him with this authority.

MR. DAVIS: By there, there, there were two statements by Russell Gaines. One is he-- where he place is-- it's a Robert Thompson is "best bird dog to get it done." I guess the, and the keyword in that statement is it-- what does it mean? I think that's you know, what this case in those old days. Does it just mean to deliver the paperwork or does it mean to get the negotiations at all-- and all of them were done. It's our position that to get it done means the whole loan process, because the persons that Roger Kelly and his attorney were dealing with in this old process, who's Robert Thompson solve it. Not until the time the loan commitment when one of ra-- of Roger Kelly's attorneys talk to Russell Gaines to go down; that the checklist make sure, I think it's done. Everything you've done through Robert Thompson. All [inaudible]

JUDGE #1: Is everything engage in selling the house is to re-broke it, that broke can't, can't be agreed you know, I've decided, I'm going to sell your house to them for this amount, I mean that's not the broker's deal, broker carries mess this line, that way and back and forth but the people have to sign off for the agreement. We wouldn't-- I wouldn't want my broker telling me "I just sold my house," would you?

MR. DAVIS: No, your Honor.

JUDGE #1: Well, isn't that all Thompson was doing?

MR. DAVIS: What Thompson is doing is he had negotiate loans and the-- there is evidence in the record that and prior to this Roger Kelly loaned-- this loan process, that he have done loans on behalf of Southwest Guaranty before. And as far as the evidence of how he got the type in-- his possession.

JUDGE #2: When you say done, what? He don't [inaudible]

MR. DAVIS: He have had-- he had handle, he had handled loans and when has this ...

JUDGE #2: When you say handled, done, whatever ...

MR. DAVIS: Down the financial form

JUDGE #2: We had never negotiated the terms of the loan, it said.

MR. DAVIS: I'm not aware where it had negotiate terms or not before the Robert Kelly, but he had worked with Southwest Guaranty on numerous occasions, that's one way he got sure of this ...

JUDGE #3: The three never signed on behalf of Southwest.

MR. DAVIS: I will never sign on behalf of-- so if that was all ...

JUDGE #3: So here's my problem, if you can't, if you knew the guy couldn't sign on behalf of the Southwest, how come you knew it was, it was okay for you to believe that he could say orally, "It's a done deal"? It seems to me that's the same thing in it.

MR. DAVIS: And with the same because everything that in, in the past, every ask that could this loan application loan process was, was handled with Robert Thompson.

JUDGE #3: Right. But you knew he couldn't sign before. Your guy never says it's affidavit on both Thompson could sign.

MR. DAVIS: True.

JUDGE #3: There's nothing in the papers suggesting Thompson was going to sign.

MR. DAVIS: It's true.

JUDGE #3: So if you can't sign, how can you say "It's a done deal? Have you have seemed like that's the same authority?"

MR. DAVIS: And they goes back only the statement that Robert Thompson which supports this Court doesn't look after this agency relationship and saying that, "What Ro-- what Roger Kelly believe was the authority of Robert Thompson in gaining all back to, to the loan had been issue, there is a statement there was against made the-- I don't know how he got his loan documents to, I may send, may fax them, but somehow, I've got this documents to him. That is in Russell Gaines ...

JUDGE #2: But how was that different from? Is there reason not to compare this to the insurance context were you able recording agent is listening agent? Why would not be in up to analogy?

MR. DAVIS: Because here you have one person handling the entire process from negotiation which he agree to do. On behalf of Roger Kelly, Robert Thompson agreed to that advisory fee agreement. And then you have Russell Gaines stating that Thom-- that Thompson solicited that if he views Thompson solicit this loan.

JUDGE #2: So you'd agree we can in-- we could use that analogy to the insurance context of recording versus soliciting agent, you just think you need that test here.

MR. DAVIS: Yes, your Honor.

JUDGE #1: Well, the other thing is that, certainly, is though claimed, the Thompson have the authority to negotiate the terms of, of the deal. Anyway, the conditions for example, as to Kelly had title to the property, the argument seems to apply that Thompson can waive that condition because financing didn't come through in the conditions were met that he was-- he would bound anyway because he said, "Let's get this deal done."

MR. DAVIS: Where Thompson even paty to-- into this is, he said, "If Robert comes in not only [inaudible] adviser from his partner and then Robert Thompson comes in." Well, no, we need this, we need actually say, "This is a refinance, not a, not a purchase coming from Gaines." There, there's a form and partial of the negotiation process whether you're negotiating for refinance or whether you're negotiating for new loans, or for new property. So that, that is an inter comport of the negotiation process that Thompson innovative himself into by his statement that this is what Russell Gaines told me we, we need to do.

JUDGE #3: And the Thompson have the authority to, to make those-- to conduct those negotiations.

MR. DAVIS: Yes, your Honor. That, that was, that was our understanding in ...

JUDGE #3: Okay. You're understanding all the base is from what? Just because of what he said?

MR. DAVIS: The fact that, all dealings were at Robert Thompson, Robert Thompson had all the loan documents, everything was made it through Robert Thompson. Nothing was done with Russell Gaines until the end, if you would check those this gone through to, to, to be sure that all passes of it-- of the need process to loan invests. The letter to memo can be sign which you-- which it was. Anything maybe cleared up, anything either be done, anything will be changed, always that Robert Thompson not Russell Gaines.

JUDGE #1: So, so when any person comes in, conducts that sort of negotiation, discussing the terms, that will always have the effect of

binding some principle even though there's no evidence at the principle agreed to do that?

MR. DAVIS: Look, is-- there's an issue of what, of what you can-- can't do. Robert Thompson could've said, "Guess how t goes Gaines about this, how had the authority to, to discuss this, that never took place, everything that took place from the negotiation alone, with the loan-- with the loan application process with through Robert Thompson."

JUDGE #1: Would've Thompson have been-- what if Thompson had three different lenders on, on the line, the counsel said, "Look, they're all going to have to hear, but we're all going to ha-- we're-- they're all going to have to have these things, they're all going to have to have title policy at some point, here's a way with-- we need to say it's refinance through all, none of will do it." Then he comes back and he says, "Mr. Gaines, he comes back says it was Company C, done deal or Company C." This Company C then beyond even though he's got three applications he's handling for Kelly?

MR. DAVIS: They're going to cancel the facts that in, in the relationship that Robert Thompson and then Roger Kelly had and their understanding is they have a relationship and the other two loan companies.

JUDGE #1: Well, under for Kelly, I mean, you've been dealing with the same thing for Thompson that aren't we in the same situation, we just-- Thompson this case dealing with three different companis, Kelly is dealing with Thompson, Thompson got three of his negotiating with, he get thebest deal actually for, for Kelly, and he goes to Kelly and says, "Since going to give you to best deal to done deal." Is that then bind C to ...

MR. DAVIS: I believe he still have to have other fact sought it if there have to have to have understand did Robert Thompson keeps the loan documents for all his companies, did he act and who like proceed asking for Roger Kelly and for this other company.

JUDGE #1: Let's assume all of that is looking all over to say. This Thompson get to pick, I mean Kelly, Kelly thinks Thompson can bind all of this people and Thompson as able to bind all of this people just cause he's dealing with Kelly and he's got the same situation all of-- I mean, just get to live, he said, "It's a little better deal, see it'll better interesting." In that, in that case Kelly, can use Thompson to bind C or B or H.

MR. DAVIS: Assuming the same set of facts ...

JUDGE: And done deal will set on, on all three?

MR. DAVIS: Right.

JUDGE #1: Should there all three done deal except C gives you a little better interest three.

MR. DAVIS: And they got a point of who actually gets the letter of other commitment, who actually it says, "I'm going to get the loan, same as the done deal that maybe one thing and we yet, we fall through [inaudible]"

JUDGE #1: So that Gaines give the letter, did they-- did Kelly get the letter commitment from Gaines.

MR. DAVIS: Yes, your Honor.

JUDGE #1: And there were no qualifications and then was done deal later?

MR. DAVIS: Yes, your Honor. It's a done deal, we got letter commitment and then was signed up by Southwest Guaranty and Roger Kelly.

JUDGE #1: In, in Southwest said, "There-- you don't have to do-- I mean, you got the money, you don't have to prove you hold it, you don't

have to prove anything, you've got money."

MR. DAVIS: I don't want to say you got the money as letter commitment that we will fund this loan, is a turned out Southwest Guaranty lost their social funding or passing in every depend as well as of funding, that was, that was the contention in the, in Court of Appeals, in discovery. We we're not allowed to find out who the sources of funding were, whether to reimburse sources of funding. Well, I think, going back to your, to point, I may have cover this but it depends on whether you do or do not get letter commitment. I think, just state that done deal, does, does not as turning out itself rise to cause of action. Is that a loan with other commitment. And that's we have in this case.

JUDGE #1: Had a letter commitment from Gaines?

MR. DAVIS: Yes, your Honor. [inaudible] And I point at one thing at-- about the Court of Appeals in its opinion, and in put the same as same date, in facts able to where the actions of Thompson. And then they go to cite preparing authority, I think, what they failed to do is going one further step. And that's one thing I try to elaborate this point to the actions of, of Russell Gaines with [inaudible] agency. Where the Court of Appeals didn't do unfortunately is, is cite, a state the law where you get with the action agent of the principle on an agency does once of the Court of Appeals left out, that's what I've tried to do my brief if, if in due today is point the acts of action that Russell Gaines which show the agency, which is he gave the loan documents to be completed to Robert Thompson, he said, "Could to be the overt-- best bird dog he get it done to get-- would mean in the loan process, get it done." and he so-- and he utilized Thompson to solicit Roger Kelly for the loan. And all the loan process was done through Robert Thompson until the end. We din't understand the loan.

JUDGE: Is this-- are you make an argument that this is something peculiar to loan financing, this kind of relationships or doesn't hear argument applied to all brokers?

MR. DAVIS: We apply-- I don't know-- but I'm not making a case specific or, or specific to, to loan ...

JUDGE: Just wondering, you know, I've got daughter applying to college, and I get-- I can download their applications forms from the5 comments as letterhead and that if she's going to apply to college, I'm the one who's probably going to ask the "bird dogger" to do because it's not while about the idea and so if the communications between the college, they sent me letter as all the time, I can admit my own daughter to college, then they have to take her.

MR. DAVIS: Well, you Honor, I don't be, I'll be ...

JUDGE: So what's the difference? and I haven't done anything more, I don't think that what Thompson did. Assume I've had two col-- two kids before and they both into that going to that college, so we've had dealings before, can I admit my lines two daughters. Without their approval.

MR. DAVIS: No.

JUDGE: Well, so what's the difference?

MR. DAVIS: The difference is, one we have a relationship between Roger Kelly and, and Robert Thompson begin with, with said some that duty -

JUDGE: I've got relationship with my daughter.

MR. DAVIS: - with we-- it says that that duty of disclosure for Robert Thompson say, "Okay, I'm acting as an agent for you, now I'm also act as an agent for Russell Gaines and Southwest Guaranty." And then he goes and they solicits a loan on behalf of Southwest Guaranty.

Enclose the soliciting loans on behalf of or for Roger Kelly that been Russell Gaines admitted that Robert Thompson was solicit this loan on behalf of Southwest Guaranty, is an agency capacity of that point. Then he gets a loan applications from Russell Gaines from the Southwest Guaranty. And well-- and Russell Gaines says, He's the best bird dog to get it done. And as I understand it they're only-- to look at that is the entire loan process from negotiation in the start to the end. There's no evidence said in negotiation that placed between Roger Kelly or his agents or his attorneys and Russell Gaines before Robert Thompson didn't picked it. Then we get this loan at-- the loan process gets done, the application gets filled out and get submitted, then and therefore we have a contract with Russell Gaines, at that point we have to check this going through and they relates funds for a letter of commitment that is issue. So the only evidence that there is, is that we'll be go-- negotiations in entire process of the loan until the Court has signed signature the loan commitment was with Robert Thompson. So the only evidence that raised of agency is wit. So there are plenty of evidence there briefly, they're between Robert Thompson, Southwest Guaranty in Russell Gaines.

JUDGE #1: But the only thing that-- I'm still not quite getting, is the only thing that you get from Gaines in Southwest is a loan documents which include all these conditions. And if those conditions are complied with, then they worked that have mainly, then the loan-- that Gaines will not perform pursuant to of what his own document said. Had, had is that, had is anything to Thompson do change that?

MR. DAVIS: The-- I think in-- whether you may ask the loan in the-- at the could, could harm something could [inaudible] requirements were complied with because the checklist was done between one Roger Kelly's insurance and Russell Gaines which precipitated the letter of the end of being issue. It was ain't lack of funding which is one the loan have never went through enter a commitment. There was anything Roger Kelly did.

JUDGE #1: On behalf of-- like I guess I'll better understand all those facts so [inaudible]

MR. DAVIS: I guess Roger Kelly grant a-- I hate to be in that forced, but Roger Kelly during this process, we talk of Robert Thompson that one that you'd be done and one of the requirements of this loan form. The application was done, it was finally submitted to Robert Thompson, fund a gap to Russell Gaines. And when he got to Russell Gaines, Mr. Broocks would have not recognize attorneys. When it contacted Russell Gaines to find that issue to the-- here's or get our checklist of what we need to get the full commitment. Have we comply with everything and during that conversation, everything found that I think it was complied with, at that point, the loan it-- was issued, nothing more to do for Roger Kelly but shall be closing for a loan to take away.

JUDGE: But why, why do they need a closing if there is nothing else to do ordinary some kind of a title, commit more title, search to had to remind, and things of that nature.

MR. DAVIS: With Roger Kelly's duties is far as the loan itself was done to the checklist and their commitment was issued. At that point, as far as the loan is concerned to get the commitment to be have done, he was finished. At that point and some point in the next two days or so, the financing for whatever reason whether was there or not, we don't know the financing didn't take place and Mr. Gaines full letter of commitment. It was nothing ...

JUDGE: But it's not-- maybe this what I missing, that here he say

that your client did everything he needed to do and have the loan commitment, but didn't adequately representations as to time, All right?

MR. DAVIS: His, his ownership?

JUDGE #3: Yes.

MR. DAVIS: There were representations to Robert, Robert Thompson is to bind the proba-

JUDGE #3: Not on the-- not to loan document is sell. Mr. Kelly made representations and obtain the loan that he had title for this on degree of title to the property where should this tried to develop, am I correct?

MR. DAVIS: Trying to recall, but I do recall is he made the representation and there was a refinance from it wasn't but that was become Robert Thompson said, "This will be have to do, to get this loan finished." Of course, -

JUDGE: Well, I guess my point ...

MR. DAVIS: - Or I mean, he had a partnership interest from the company.

JUDGE: Right. Okay, my point though is that having done all those things, then the representations that were made that it becomes-- became the part of the, the finance company to do, do diligence to determine with those all those same for accurate. And is that worth a thing broke deal?

MR. DAVIS: No, your Honor.

JUDGE #3: Okay. Why we're still this it?

MR. DAVIS: That there, there is, there is no-- the only evidence in the record is to why this loan was form, is when, when Mr. Shuckom were Roger Kelly's attorney is contacted Russell Gaines you know, about fa-- after finding an applications over financing. There was a heated discussion, at that point, Russell Gaines told the loan commitment. The only evidence is, he put the loan, loan commitment because of heated discussion, not because any other act or, or malfeasance or misarguing the court Roger Kelly.

JUDGE: I think there's no further questions Thank you.

MR. DAVIS: Thank you. This loan didn't close the use of properties with title not because that they loss of source of funding, those are all disputed facts and they're not really before the Court. The material facts that it before the Court have to deal with and, and the trial Court found and the Court of Appeals found that the loan commitment all conditions perceive had not been met on the loan commitment, and the loan commitment was not an enforceable document, there is not a breach of contract case. The-- there, there are factual disputes as to why the loan have fund that should-- but that's not really at issue here, at issue is whether Mr. Thompson had the authority basically to buy Southwest Guaranty to make this loan. The document itself, the loan can-- awkward say it look that it had bind, if did not bind Southwest Guaranty and if it did not bind Mr. Gaines. Then the question is, can Mr. Thompson himself, there is comment that it's a done deal when Mr. Gaines has not given him the addition of authority to negotiate the deal. There is no evidence that he had the, the scope of authority other than to "bird dog" his documents, and in fact, even that comment that he was the "best bird dog to get that it done" was made in Mr. Gaines deposition again years after the [inaudible]

JUDGE #1: There's a statement that Mr. Thompson handled the entire transaction, is that true, is that false?

MR. DAVIS: That-- well, that's false judge. And it-- that is

absolutely false and, and again, but you know, there are assertions on part of Mr. Kelly that he did. You know, assertions on the part of Mr. Gaines and did-- that he certainly did. Mr. Gaines, to that of all the requirements, the amount, the interest rate, everything is done by Mr. Gaines. Mr. Thompson had no rule whatsoever in any of that, and and Mr. Kelly could point to know where in the record where Mr. Thompson ever actively involved himself in the actual negotiation of the terms, the deal. It didn't have that authority to find general agency by himself which is really what we're looking at here, if you have the power to bind Southwest Guaranty to the loan, you're a generally for all purposes, because that's the business. To find general agency by estoppel, simply because a person possesses blank paperwork in a business [inaudible] of course, it is business. With regularly alter the landscape of how nor vigilance done to the broker in a state. For every broke-- mortgage broker at risk of becoming an agent to the funding source. And I would point out, because Mr. Thompson was Kelly's agent, that's undisputed, whether or not Thompson was Gaines in Southwest Guaranty's agent, that's dispute, and that's the issue that we're, that were presenting argument to this Court on right now. But having the blank forms, is equally consistent with the conclusion that Thompson was acting his Kelly's agent.

JUDGE #1: There, there was a statement made that Mr. Thompson had placed other loans in other type of arrangements, that's not any thing we need to look at, All right.

MR. DAVIS: [inaudible] If the Court has no further question.

JUDGE: I hear no further question Mr. Larsen. The case is submitted and all counsels have been submitted this morning, at this point of Marshall will adjourn the Court.

COURT ATTENDANT: All rise. Oyez, Oyez, Oyez, the Honorable Supreme Court of Texas is now stand adjourned.