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Contracts - Real Estate Broker - Right to Commission Upon Vendor's Arbitrary Refusal to Enter Contract of Sale

Victor Savikas

result reached by the application of the instrumentality exception seems to be the same as the result in the recent state decisions which have rejected the rule flatly.[61] These recent state decisions indicate a trend among the states to reject the proposition that the "mere evidence" rule is mandatory on the states under *Mapp v. Ohio*, i.e. that it is a constitutional standard. The states hold instead that the purpose of the fourth amendment was to prevent general exploratory searches and these are prohibited and nothing more.

Many state courts do not appear to have considered the issue. It will be interesting to observe the result when they do. However, the ultimate answer must come from the Supreme Court of the United States. Since state courts are expressly disregarding the rule and the federal courts are reaching a similar result through the application of the instrumentality exception, it appears that the answer may soon be forthcoming. This answer may have already been indicated by the failure of the Supreme Court of the United States to review not only the federal court decisions which have tended towards dilution of the rule,[62] but also the state court decisions which have clearly rejected the rule.[63]

Stuart Weisler

[61] See People v. Carroll, *supra* note 33; People v. Grossman, 257 N.Y.S.2d 266 (1965); People v. Martin, *supra* note 35; People v. Thayer, *supra* note 30; People v. Potter, 49 Cal. Rptr. 892 (1966); State v. Bisaccia, *supra* note 8; State v. Wade, 46 N.J. 48, 214 A.2d 411 (1965); State v. Fioravanti, 46 N.H. 109, 215 A.2d 16 (1965); State v. Coolidge, *supra* note 44; State v. Cook, *supra* note 42.

[62] Foley v. United States, *supra* note 14; Landau v. United States, *supra* note 14; United States v. Guido, *supra* note 18; United States v. Boyette, 299 F.2d 92 (4th Cir. 1962).

[63] *Supra* note 30.

CONTRACTS–REAL ESTATE BROKER–RIGHT TO COMMISSION UPON VENDOR'S ARBITRARY REFUSAL TO ENTER CONTRACT OF SALE

Stromer, a real estate broker, entered into an oral contract[1] with de-

[1] The fact and terms of employment were found in a counteroffer to the vendee sent through the broker. In addition, when Browning's documents were delivered to the escrow depositary, a brokerage contract signed by Browning was included. California courts have held that signed escrow instructions, when of sufficient content, satisfy the Statute of Frauds, Beazell v. Schrader, 59 Cal.2d 577, 381 P.2d 390 (1963). Sufficient content means written evidence of an actual employment relationship. Franklin v. Hansen, 59 Cal.2d 570, 381 P.2d 386 (1963). In addition to California there are sixteen states which require brokerage contracts to be in writing before a broker can recover his commission: Alaska, Arizona, Idaho, Indiana, Kentucky, Michigan, Montana, Nebraska, New Jersey, New York, Oregon, Texas, Utah, Washington, Wisconsin, and New Mexico.

fendant Browning whereby Stromer was to procure a purchaser for defendant's ranch. In return Stromer was to receive a commission out of the purchase money as, if, and when received from the purchaser. Stromer found two brothers, Roger and Richard Wilbur, who desired to buy the ranch. Negotiations between the Wilburs and defendant Browning resulted in an oral agreement which Browning testified consummated the deal. However, the parties agreed not to be bound until each had examined, approved and executed the documents of sale which were to be prepared by Browning's attorney. When these documents were presented to the Wilburs, the terms of the oral agreement had been substantially changed.[2] The Wilburs refused to continue negotiations and demanded the return of their escrow deposit. Thereafter, Stromer brought suit against Browning to recover his commission. The Superior Court rendered judgment for the broker. On appeal, the District Court of Appeals held that the broker was entitled to recover his commission even though the vendor and vendee had not entered into an enforceable contract. *Stromer v. Browning*, 50 Cal. Rptr. 796 (1966).

This note will be concerned with the effect that a vendor's withdrawal from negotiations with the vendee has upon the broker's right to a commission. Furthermore, as will be shown later, the present law of brokerage contracts denies compensation to a broker in this situation, whereas the noted case allowed the broker to recover despite the fact that the vendor and vendee had never consummated a contract. At this time it is sufficient to state that the vendor's refusal to proceed may be warranted or unwarranted. This discussion encompasses both situations, but stresses the area of an unwarranted refusal since this was the situation in the noted case.

A brokerage contract is interpreted by the ordinary rules of contracts[3] and a broker's right to a commission is determined by the provisions of that employment contract with the principal.[4] In the absence of any special contract, the broker is entitled to a commission when he has procured a buyer ready, willing, and able to purchase on the terms specified by the principal.[5] The broker, however, is free to agree to any conditions.

[2] A levee bordered the edge of the acreage that Browning wished to retain. Just south of that levee the Wilburs proposed to set up a duck pond in the bean field. A pipe equipped with a valve extended through the levee and water from Browning's land would flow into the proposed duck pond. The oral agreement established the boundary line as the center of the levee. Browning's final documents changed that line to a point twenty feet south and gave control of the water pipe to Browning.

[3] Kritt v. Athens Hills Development Co., 109 Cal. App. 2d 642, 241 P.2d 606 (1930). See also 12 C.J.S. *Brokers* § 59.

[4] Uhlmann v. North Whittier Highlands, Inc., 167 Cal. App. 2d 758, 763, 334 P.2d 1022 (1959); Pick, *Licenses, Regulation and Employment of Brokers*, Badeaux v. Rohrer, 182 Ill. App. 114 (1913). See also 41 CHICAGO-KENT L. REV. 41, 46 (1964).

[5] Levit v. Bowers, 2 Ill. App. 2d 343, 119 N.E.2d 536 (1954).

For example, the contract may specify that the commission is to be paid out of money actually received from the vendee,[6] or upon the successful completion of the escrow,[7] or the vendor's procuring a trust deed.[8] These contingencies are express conditions precedent which must occur before a duty arises upon the principal to pay the commission.[9]

Often the contract between the broker and vendor contains conditions that the vendor must execute a contract with the vendee and the broker's commission will be paid only upon the actual receipt of purchase money. Assume the vendor and vendee enter into a contract of sale but the actual transfer of title never takes place. Failure of the transaction could be attributed to various reasons,[10] but of importance to this discussion is failure due to the vendor's withdrawal. If that withdrawal by the vendor is warranted, the broker is not entitled to his commission. The case of *Cotton v. Jewell Theatre Corp.*[11] illustrates this point. The vendor refused to enter the escrow transaction when the escrow instructions were not drawn according to his previous directions. The court reasoned that where the action of the vendor was reasonable in view of the circumstances so as to justify his refusal to proceed, the broker will not be allowed to recover his commission.

In a brokerage contract where payment of a commission is contingent upon the actual consummation of the sale and the vendor and vendee have executed a contract, an unwarranted withdrawal by the vendor will not defeat the broker's right to compensation. In *Coulter v. Howard*,[12] the commission to the broker was to be paid out of escrow funds. The broker produced a purchaser who negotiated with the defendant Howard for the purchase of a twenty acre orchard. Prior to the transfer of title, the contract of sale was repudiated by the defendant. The court held, that since the vendor repudiated the contract, the condition in the brokerage contract was excused and the broker was allowed to collect his commission.

The problem is compounded in the *Stromer* case.[13] Commission to the

[6] Stromer v. Browning, 241 Cal. App. 2d 763 (1966).

[7] Turner v. Waldron Realty, 209 Cal. App. 2d 376, 25 Cal. Rptr. 771 (1962).

[8] Lawrence Block Co. v. Palston, 123 Cal. App. 2d 300, 266 P.2d 856 (1954).

[9] 5 WILLISTON, CONTRACTS § 663 (3rd ed. 1964). 3a CORBIN, CONTRACTS § 768 (1960).

[10] The transaction may fail because the vendee was unwilling to close the deal in which case the broker is denied his commission. See Ira Garson Realty Co. v. Brown, 180 Cal. App. 2d 615; 4 Cal. Rptr. 734 (1960). The sale may never be consummated because of the vendor's inability to convey good title, Swigart v. Hawley, 140 Ill. 186, 29 N.E. 883 (1892). The broker was allowed to recover his commission. However, if the broker has actual knowledge of a substantial defect in the vendor's title he will not recover his commission. See Shopen v. Bone, 328 F.2d 655 (8th Cir. 1964).

[11] 146 Cal. App. 2d 243, 303 P.2d 593 (1956).

[12] 203 Cal. 17, 262 Pac. 751 (1927).

[13] *Supra* note 6.

broker was to be paid out of money received from the purchaser. The broker procured a prospective purchaser who negotiated with the vendor but a contract of sale was never entered into because of the vendor's peremptory action. Though the court in *Stromer* called the defendant Browning a "repudiating seller,"[14] there could not be a repudiation of the contract since there never was a contract between the vendor Browning and the vendees. What Browning repudiated was in effect an oral agreement. However, it had been expressly agreed by the parties that no one was to be bound by that agreement until it had been reduced to writing and executed. Even in the absence of a contract of sale the broker recovered his commission because of the defendant's capricious refusal to continue. As stated by Justice Friedman: "When consummation of the sale is prevented by the seller's unjustified refusal to proceed with the transaction, the broker is entitled to his fee."[15] In effect, the court completely dismissed the necessity for a contract of sale. In support of this reasoning the court cited *Collins v. Vickter Manor, Inc.*[16] In this case the vendor and vendee executed a contract of sale but the vendor arbitrarily refused to fulfill his obligation. In allowing the broker to recover, the court stated, "consummation of a final agreement was prevented solely by the arbitrary refusal of the [seller] to proceed. . . ."[17] As additional authority the court, in the instant case, cited *Ratlaff v. Trainor-Desmond Co.*[18] However, as in the *Collins* case there was a contract of sale between the vendor and vendee and the broker was to receive a pro rata share of the purchase money. The vendor assigned the contract to a third party thereby making it impossible for the broker to receive his commission. The court reasoned that the condition was excused by the vendor's act and allowed the broker to recover his commission.[19] However, both these cases can be distinguished from the case at bar in that each involved an executed contract of sale whereas the *Stromer* case did not.

In *Matteson v. Walker*[20] the Illinois Appellate Court was confronted with the same factual situation as the *Stromer* case in that there was no contract of sale. The broker's commission was contingent upon the ven-

[14] *Id.* at 802.

[15] *Ibid.*

[16] 47 Cal.2d 875, 306 P.2d 783 (1957).

[17] *Id.* at 881, 306 P.2d at 787.

[18] 41 Cal. App. 586, 183 Pac. 269 (1919).

[19] In addition to the Collins case and the Ratzlaff case the court cited Coulter v. Howard, *supra* note 12, and Turner v. Waldron Realty, 209 Cal. App. 2d 376, 25 Cal. Rptr. 771 (1962). However in each of these cases there was a contract between the vendor and the vendee.

[20] 249 Ill. App. 404 (1928). See also: Crouse v. Rhodes, 50 Ill. App. 120 (1892) in which there was an arbitrary refusal by the vendor to execute the contract but the brokerage contract allowed for the payment of commission when the broker produced a purchaser ready, willing, and able to buy.

dor's receipt of the purchase price and the defendant vendor arbitrarily refused to execute the contract of sale. The court, even though confronted with the defendant's capricious behavior, did not allow the broker to recover his commission, stating that "the commission was only payable upon the consummation of a sale, and while it may seem arbitrary for defendant to refuse to carry out the sale . . . the parties must be bound by their [brokerage] contract."[21]

In 1963, the District Court of Appeals of Florida rendered a decision consistent with the holding of the *Matteson* case in *Hahn v. Mark*.[22] Here the court did not allow the broker to recover his commission holding that the agreement specifying that the commission would be payable only when title was actually transferred precluded recovery even though the absence of a closing was due to the seller's refusal.

An analysis of prior case law indicates that a broker is entitled to a commission when he procures a purchaser ready, willing and able to buy on the terms specified by the vendor,[23] unless there is an express provision in the brokerage contract that provides otherwise. If that provision makes the payment of commission contingent on the execution of a contract between the vendor and vendee, such a contract must be entered into before a broker is entitled to his commission.[24] In comparison, the *Stromer* decision stands for the proposition that when the execution of the contract between the vendor and vendee is an express condition precedent to the broker's right to a commission and the vendor arbitrarily refuses to execute the contract of sale, the condition is excused and a commission must be paid. Furthermore, the court stated that the existence of a "formal, enforceable contract of sale is not a precondition of recovery where, after a meeting of the minds between the principals, the seller voluntarily repudiates the agreed terms."[25] However, all the cases cited by the court involved formal enforceable contracts between the vendor and vendee. While the court has extended present case law, it apparently qualified its own position by requiring a meeting of the minds in negotiations between the vendor and vendee. This case may be the opening of the door to allow

[21] Matteson v. Walker, *supra* note 20, at 406.

[22] 158 So.2d 563 (Fla. 1964).

[23] 4 WILLISTON, CONTRACTS § 1030a (Rev. ed. 1936).

[24] Prather v. Vasquez, 162 Cal. App. 2d 198, 327 P.2d 198, 327 P.2d 963 (1958); Lawrence Block Co. v. Palston, 123 Cal. App. 2d 300, 266 P.2d 856 (1954); Cochran v. Ellsworth, 126 Cal. App. 2d 429, 272 P.2d 904 (1954). In the latter case the court said that with a broker's compensation contingent upon consummation, liability did not arise until consummation.

[25] Stromer v. Browning, *supra* note 6, at 802. For a discussion of the present state of the law in Illinois, see 5 I.L.P. BROKERS § 84 (1953).

the broker to recover his commission whenever the vendor makes an inexplicable withdrawal from the proposed sale. It remains a matter of conjecture whether or not the principle established will be accepted by other courts when confronted with a similar situation.

Victor Savikas

CRIMINAL LAW–BURGLARY–UNLAWFUL ENTRY IMPLIED IPSO FACTO BY INTENT OF ACCUSED

In response to an ADT alarm, police discovered the defendant in the Chicago Historical Society Museum after closing hours. At the time of his apprehension the defendant was situated in a room in which a showcase was pried open, a screwdriver lay on the floor, and a button matching those remaining on defendant's shirt was found nearby. Proceedings were commenced by the State under the Illinois burglary statute; the State electing to prosecute under that provision which makes unlawful an unauthorized entry into a building with intent to commit a felony or theft therein.[1]

Defendant was convicted and appealed contending that the requisite element of entry without authority had not been established by the prosecution. The conviction was affirmed, the Illinois Appellate Court holding that the statutory requirement of an unauthorized entry need not be shown directly by the State, but may be found presumptively through proof of the preconceived intent of the wrongdoer to commit a felony or theft therein. *People v. Schneller*, 69 Ill. App. 2d 50, 216 N.E.2d 510 (1966).

The importance of the *Schneller* decision is at once apparent when viewed in conjunction with the requirements contained in the Criminal Code of 1961, and other related decisions. In the case at bar the court ruled, in effect, that the statutory requirement of entering "without authority" will be established ipso facto where the entry is coupled with an intent to commit a felony or theft. The holding thus serves to obliterate the former requirement present both at common law and under prior

[1] ILL. REV. STAT. ch. 38 § 19-1(A) (1965) which states:
"A person commits burglary when without authority he knowingly enters or without authority remains within a building, . . . with intent to commit therein a felony or theft."
It is interesting to note that the State did not choose to indict the accused under that portion of the statute which makes unlawful the remaining within a building without authority. This would have avoided the controversial issue as to whether one can enter a public museum during the period in which it is open, without authority.