

RECENT CASES

Brokers—Commissions

Plaintiff, a real estate broker, procured a dummy corporation as a purchaser of defendant's property, and a contract of sale was duly made. There was no intent on the part of the purchaser to ever carry the contract to completion, but both defendant and plaintiff were unaware of the fraud. Its purpose accomplished, the dummy refused to complete the contract, and plaintiff sued defendant for his broker's commission. *Held*: The proposed purchaser must be a bona fide purchaser *in fact* in order to entitle the broker to commissions. Judgment for defendant *Houston v. Brittingham et al.*, 125 N.J.L. 296, 15 A. 2d 657 (E. & A. 1940).

In the ordinary course of the brokerage business it often occurs that buyers and sellers are brought together by the efforts of brokers, and the sale is never in fact consummated, although the buyer is able and willing to conclude the transaction on the buyer's terms, and although a contract is in fact entered into. Such cases are not unusual, but the case herein reviewed *is* unusual. In this case the contract to sell the property failed because of *fraud* on the part of the purchaser. In the ordinary case the parties to the contract intend to perform at the outset but later change their minds and breach the contract.¹ In such a case the broker has done his part and should not lose his commission because the purchaser subsequently decides not to live up to the contract he has made.² This case is different, however. The brokerage business is one which is fraught with dangerous risks, and one of the risks that the broker must assume is that the purchaser he procures be bona fide, and that the failure to sell was through no fault of his own or the customer he procures.³

It is not sufficient to entitle the broker to his commission that he has procured a customer who is merely willing and able to *contract* on the seller's terms; although it must be admitted that there are some courts holding such performance to be enough to meet the re-

1. *Maxwell v. Staulcup*, 103 N.J.L. 509, 138 A. 201 (S. Ct. 1927).
2. *Thompson v. Briscoe*, 108 N.J.L. 387, 156 A. 488 (E. & A. 1931).
3. *Carrington v. Graves*, 121 Md. 567, 89 A. 237 (1913); *Stevenson v. Baunan*, 253 Pa. 512, 84 A. 447 (1919).

requirements for the earning of the broker's commission.⁴ The customer must be willing to, and able to *purchase* on the terms of the seller in order to entitle the broker to his commission.⁵ The broker who brings a proposed purchaser who actually doesn't intend to complete the contract of sale, or who has not the means to do so, has in effect done nothing! We must examine the qualities of plaintiff's customer objectively in order to determine whether the procurement of such a buyer was enough to entitle plaintiff to a judgment against defendant. It is clear that the buyer never intended to complete the contract it made with defendant, since its purpose didn't require completion of the agreement. The New Dorp Realty Corporation had no assets whatsoever, admittedly, and can not therefore be said to have been "able" to perform its contract with defendant. The intent or willingness or ability of the purchaser cannot be judged by the fact that it signed a contract to purchase.⁶ The ability was lacking, since the actual parties in interest are comparatively immune from liability upon the contract of sale, not having been signers themselves.⁷ But, even had there been the ability to perform, it is evident in the light of what really transpired later that there was no intent ever to perform the contract made with defendant, and so plaintiff has fallen short of the mark.

There are, to be sure, cases holding that when the principal has accepted the customer procured by the broker and has entered into a contract with him, he cannot thereafter question the performance by his broker.⁸ However in one of these very same cases it was said by the court: ". . . the broker in order to recover was obliged to show that he had produced a lessee able, as well as willing, to lease. . . ,"

4. Schamberg v. Kahn, 279 Pa. 477, 124 A. 138 (1924).

5. Tucker v. Mahaffey, 6 N.J.Misc. 17, 138 A. 806 (S. Ct. 1928). "A broker employed to negotiate the sale of real estate earns his commission when he has procured a purchaser able and willing to conclude a bargain on the terms on which the broker was authorized to sell."

6. Judis v. J. B. Holding Corp., 246 App. Div. 273, 285 N.Y.S. 449 (1936).

7. Smith v. Krepis, 104 N.J.L. 408, 140 A. 314 (E. & A. 1928). Carter, the proposed purchaser, was a "strawman" for four operators ". . . whose respective checks paid the deposit money, but who, not having signed the written contract of sale, were not responsible as purchasers for the purchase price."

8. Hekemian & Co v. Rivara *et al.*, 121 N.J.L. 418, 3 A. 2d 165 (S. Ct. 1938); also: Freeman v. Van Wagenen, 90 N.J.L. 358, 101 A. 55 (S. Ct. 1917).

and holds further that since the corporation procured by the broker was a mere shell with no assets of its own the broker is entitled to no commission.⁹ Thus it is apparent from a reading of the cases that the weight of authority in this country requires more than a mere subjective willingness to enter into a contract with no intent or ability ever to perform.¹⁰

Assuming that both plaintiff and defendant are innocent of any fraud in this case, upon whom shall we place the loss? Mere passive innocence is not enough on the part of plaintiff because it was his duty to investigate the proposed purchaser exercising his best efforts and judgment for the protection of his principal.¹¹ Even if we did not hold plaintiff to such a strict standard of care, at least he is required to use reasonable diligence according to good business practise.¹² Plaintiff has been sadly remiss in his duty. Had he been alert it is quite probable that he would have discovered the fraud, but he did not accept his responsibility and his negligence made defendant easy prey to the fraudulent scheme perpetrated upon him. Plaintiff has done nothing which entitles him to collect commissions from defendant.

Conditional Sale—Chattel Mortgage—Filing—Automobiles

Respondent sold an automobile on July 2, 1936, to one Blanchard on a conditional bill of sale reserving to himself the title. On the date of the sale his reservation of title was duly noted on the records of the commissioner of motor vehicles in accordance with the provisions of the statute.¹ No renewal of this reservation was ever filed. On June 20, 1939, over three years thereafter, John D. Keats foreclosed a chattel mortgage on the automobile which had been given by the conditional vendee subsequent to the conditional purchase. *Held*, the title to be

9. *Hekemian & Co. v. Rivara, et al., supra.*

10. *Hagen v. Sahlen*, 226 App. Div. 271, 235 N.Y.S. 171 (1929); *Cook Co. v. Craddock-Terry Co.*, 109 S.W. 2d 731 (1937).

11. *Smith v. Fidelity & Columbia Trust Co.*, 227 Ky. 120, 12 S.W. 2d 276. (1928).

12. *Warwick v. Addicks*, 5 Del. 43, 157 A. 205 (1931).

1. N.J.R.S. 1937, 46:32-13.