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Contracts

Robert C. Bensing

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CONTRACTS

Action To Recover Earnest Money Deposit

*Cusack v. DeWitt-Jenkins Realty Co.*¹ involved an action by purchasers against a real estate broker to recover a \$500 deposit made in connection with the purchase of realty. Purchasers alleged that the broker had orally agreed to refund the deposit in the event of purchaser's failure to secure financing. It was further alleged that neither plaintiffs for themselves, nor the sellers for them, were able to obtain financing; that after such discovery plaintiffs demanded of the defendant-broker the return of the deposit, and defendant agreed if plaintiffs would procure from the seller (the client of the broker) a written release from liability; that plaintiffs secured the release, showed it to defendant, and again demanded the return of the deposit, but that defendant refused to return the money. The defendant-broker, answering, admitted that it negotiated a sales agreement between the plaintiffs and the seller, but denied having agreed to refund the deposit money, and specifically pleaded a provision of the sales agreement between the seller and the plaintiffs which provided:

. . . that there are no agreements . . . binding on any of the contracting parties hereto, or their brokers, except as herein contained. Specific reference is made to the fact that neither the seller, the broker, nor the salesman associated with the broker, has agreed to finance or procure the financing of any part of the purchase price except as written herein, nor shall any effort on the part of the seller, the broker, or the salesman, to procure for the purchaser the financing of any part of the purchase price be construed as a waiver herein.²

From a judgment for the plaintiff-purchasers, the defendant appealed. Defendant argued that the court erred in not recognizing the above assertion in the sales agreement as a contract between the plaintiffs and the sellers for the benefit of a third party, the broker; and that, as such, it precluded a judgment against the said third party beneficiary. The court of appeals, in affirming the judgment of the lower court, held that the language fell far short of creating a third party beneficiary contract; that it was only a declaration of fact in a contract on a different subject matter which did not imply a promise to do anything for a third party — an essential element of a third party beneficiary contract.

*Reese v. Walker*³ also involved a suit by prospective purchasers of realty for the return of their earnest money deposit. The purchase contract provided that it was "contingent upon securing necessary financing."

1. 149 N.E.2d 924 (Ohio Ct. App. 1957).

2. *Id.* at 926.

3. 151 N.E.2d 605 (Ohio Munic. Ct. 1958).

Purchasers attempted to obtain a loan. They were able to secure a commitment for the amount they felt they needed, but not on the terms they felt they could meet. In an excellent opinion, the Municipal Court of Cincinnati reasoned that "necessary financing" means more than simply the face amount of a loan. It includes a loan on terms the borrower can repay; that only the purchaser can determine what financing he needs; and as long as he honestly determines the kind of a loan he needs and makes a bona fide effort to obtain it, the seller cannot complain. The court found that the buyers met this standard of good faith, and accordingly ruled that since the condition precedent to consummation of the contract was impossible of fulfillment, the contract was terminated and the buyers were entitled to a return of their earnest money deposit.

Inconsistency Between Printed and Handwritten Parts of Contract

In *Botzum Bros. v. Brown Lumber Co.*⁴ it was held that where there is an inconsistency between the printed portion of a contract and the handwritten specifications, inserted at the time the agreement was executed, the handwritten portion of the contract controls.

Work To Be Done To Other Party's Satisfaction: Objective Standard Applied

Whenever one party under a contract must perform to the "satisfaction" of the other, the question arises whether an objective or a subjective standard is to be applied in judging the performance. In *Enterprise Roofing & S. M. Co. v. Howard Invest. Corp.*,⁵ where, under a contract for repair of a building, the contractor was to perform to the satisfaction of the defendant, the court adopted the objective standard, stating that the defendant "was required to appraise the work as a reasonable man would do."⁶ This is in line with the weight of authority elsewhere in the United States; the subjective standard being applied only in contracts involving aesthetic taste, art, or personal judgment.⁷

Plant Superintendent's Covenant Not To Compete Enforced

Summarily, a covenant restricting competition is valid if, under all the circumstances, it is reasonable.⁸ In *Conforming Matrix Corp. v.*

4. 150 N.E.2d 485 (Ohio Ct. App. 1957).

5. 152 N.E.2d 807 (Ohio Ct. App. 1957).

6. *Id.* at 810.

7. See CORBIN, CONTRACTS § 644 *et seq.* (1950).

8. *Briggs v. Butler*, 140 Ohio St. 499, 45 N.E.2d 757 (1942).