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Sale by Owner at Lower Price

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SALE BY OWNER AT LOWER PRICE

OCCASIONALLY CASES ARISE in which an owner employs a broker to sell property at a certain price, the broker finds an interested prospect, but the sale is made by the owner himself at a price less than that which was stipulated. When the broker subsequently sues for a commission the owner raises the defense that the broker has not fully performed, since the owner himself, not the broker, succeeded in interesting the purchaser, and the price actually obtained was not the amount the broker was supposed to obtain.

The general rule, and the rule followed in Illinois, is that if the broker is in fact the procuring cause of the sale[1] he is entitled to a commission even though the final negotiations are conducted through the owner, who in order to make a sale accepts a price lower than that stipulated to the broker.[2]

One of the earliest decisions in this area was *McConaughy v. Mahannah*,[3] an 1888 decision of the Appellate Court for the 2d District. In the *McConaughy* case, the plaintiff had entered into a broker's contract with the defendant by which he was to receive a commission of 2% if he found a purchaser for the defendant's farm at $35 per acre. Some weeks later, without the knowledge of the plaintiff, the defendant sold her farm for $32 per acre to a man that the plaintiff had introduced to her as a prospective purchaser. The court, finding for the plaintiff, held that the commission had been earned when the broker brought a ready, willing and able buyer to the seller. His right to the commission was not affected by the changes in terms agreed upon by the defendant and the buyer.

The first Supreme Court of Illinois case dealing with this problem was *Hafner v. Herron*,[4] decided in 1897. Although the case dealt with the sale of stock certificates rather than real estate, it has been cited extensively as a controlling case by many of the appellate decisions dealing with real estate brokers. In *Hafner*,

1 For a complete discussion of procuring cause, see section II (A) of this symposium.
2 Annot., 43 A.L.R. 1103 (1926); Annot., 46 A.L.R.2d 848 (1956); 5 Ill. L. & Pr., *Brokers* § 82 (1953).
3 28 Ill. App. 169 (2d Dist. 1888).
4 165 Ill. 242, 46 N.E. 211 (1897).

the plaintiff had agreed to sell certain shares of stock for the defendant and was to receive a commission for his services. Subsequently, the defendant sold the stock to a customer procured by the plaintiff, but at a figure less than that which he had authorized the plaintiff to offer. In affirming the lower court's judgment for the plaintiff, the court said that if the plaintiff had been the procuring cause of the sale ultimately concluded by the defendant and a buyer, then the plaintiff was entitled to his commission. The court held that the broker's right to the commission was in no way affected by the owner's acceptance of a sum less than that which he had authorized the plaintiff to offer.

Hafner v. Herron was cited two years later in *Snyder v. Fearer*[5] for the proposition that:

> Having introduced a sufficient purchaser to the owner, he (the broker) is not to be deprived of his commissions because the owner negotiates the contract himself or voluntarily reduces the price of the property.[6]

The commission in the *Snyder* case was to be $100 if the plaintiff could find a buyer at $70 per acre. The plaintiff found a buyer and the defendant sold to him for $68 per acre. The defendant resisted the plaintiff's claim to the commission on the grounds that it had not been earned. The court, having found that the plaintiff was the procuring cause of the sale,[7] said that the fact that the defendant had sold at a price less than $70 per acre was immaterial to the rights of the broker.

The general rule discussed above has been applied in numerous other Illinois decisions.[8] However, the courts have also recognized several exceptions to the rule.

One widely recognized exception is that when there is a

5 87 Ill. App. 275 (2d Dist. 1899).

6 87 Ill. App. at 277, quoting Hafner v. Herron, 165 Ill. at 251, 46 N.E. at 213.

7 The broker had called Shafer, the ultimate buyer, and told him that he had the farm for sale and was going to see a prospect whom he thought would buy. Shafer told him that he had been trying to buy the farm and asked him to wait until Shafer had a chance to talk to the owner. The court found that the broker's efforts "either caused the sale to Shafer or largely contributed to bringing it about." 87 Ill. App. at 277.

8 Henry v. Stewart, 185 Ill. 448, 57 N.E. 190 (1900); Mammen v. Snodgrass, 13 Ill. App. 2d 538, 142 N.E.2d 791 (3d Dist. 1957); Francisco v. Coleman, 230 Ill. App. 465 (2d Dist. 1923); Hessling v. Frey, 182 Ill. App. 547 (2d Dist. 1913); Smith v. Sears, 160 Ill. App. 240 (1911); Wright v. McClintock, 136 Ill. App. 438 (2d Dist. 1907); Ducharme v. St. Peter, 135 Ill. App. 530 (2d Dist. 1907).

special contract between the broker and his principal expressly making the payment of a commission dependent upon the broker finding a purchaser at a specific price, the broker cannot recover if the sale is made at a lower price, even if the owner sells to a person to whom the broker has first shown the property.[9] Thus, in *Mears v. Stone*,[10] the owner authorized the plaintiffs to sell some dock property for $150,000, and agreed to pay them a 2½% commission for making a sale for that sum. The plaintiffs succeeded in getting a Mr. Peabody to take an option to purchase at $150,000, but Peabody did not exercise the option. Later, however, Peabody, as an undisclosed principal, purchased the property for $135,000 through another broker. When plaintiffs learned of the sale they demanded a commission. The lower court held that if the owner discovered that Peabody was the actual purchaser before the consummation of the contract then plaintiffs were entitled to their commissions, and the court found for the plaintiffs. On appeal, however, the decision was reversed, the court stating:

> Appellant having placed his property in the hands of appellees to sell at a fixed price, and for an agreed commission, he and appellees were bound to exercise the utmost good faith toward each other. Appellees were employed to sell at the price of $150,000; they were not engaged to sell for $135,000, and if any efforts were by them made to find a purchaser at the last named price, they can hardly be considered as work done in pursuance of the authority given to them.
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> . . . . Appellees were not employed to merely introduce to appellant somebody who might upon some terms become a purchaser. It was not for such service that a commission was to be paid them.
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> . . . .
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> Appellees were employed to do a certain thing, viz., sell the property for $150,000; they were to be paid for this a certain sum, viz., two and one-half per cent; if they had in five minutes accomplished the undertaking they would have been entitled to the sum of $3,750; if they did not succeed they are not entitled to anything, unless the defendant, by some act of his, prevented their success.[11]

The special contract exception is, of course, qualified by the proposition that the broker will not be precluded from re-

9 Annot., 46 A.L.R.2d 848, 859 (1956); Annot., 43 A.L.R. 1103, 1111 (1926). See, *e.g.*, Backman v. Guadalupe Realty Co., 78 Cal. App. 347, 248 Pac. 296 (1926).

10 44 Ill. App. 444 (1st Dist. 1892).

11 44 Ill. App. 447-448. See also, Rees v. Spruance, 45 Ill. 308 (1867) (*dictum*).

covery if he is prevented from making the sale on the terms specified by the fault or bad faith of the principal.[12] Such bad faith is usually in the form of a deliberate revocation of the broker's authority when he is plainly approaching success,[13] or a fraudulent reduction in price by agreement with the prospective purchaser.[14]

Another exception to the general rule is recognized by some states. Where the owner, either himself or acting through another broker, makes a sale at a reduced price to a purchaser whose status as the original broker's prospect is unknown to the owner, these courts hold that the owner is not obligated to pay a commission to the original broker, even if he has been the procuring cause.[15] These courts feel that it would be inequitable to charge the seller with a commission where the broker has failed to notify him of the name of the purchaser, and he sells for a lower price than he otherwise would exact if he had known that he would have to pay the commission.[16] This exception has been recognized in Illinois in *Stone v. Kreis*.[17] In that case, the plaintiff had unsuccessfully attempted to interest a prospect named Hock in the defendant's property for two years. The owner and the prospective buyer finally notified the plaintiff that they could not agree and were terminating their negotiations. Some time after this discussion, the defendant sold the property to Woodward at a considerable reduction in price. Woodward actually was a secret agent of Hock, and immediately conveyed to him. The Appellate Court ruled that the jury should have been instructed that if they believed that the defendant had acted in good faith at the time he sold the property to Woodward and did not know that Woodward was purchasing it for Hock their verdict should be for the defendant. The court stated:

> But where . . . there is evidence tending to show abandonment of negotiations with the broker's customer, and entry upon negotiations with another party apparently in his own interest but in fact as the secret representative of plaintiffs' customer,

12 Annot., 46 A.L.R.2d 848, 863 (1956); Annot., 43 A.L.R. 1103, 1115 (1926).
13 See, *e.g.*, Heaton v. Edwards, 90 Mich. 500, 51 N.W. 544 (1892).
14 See, *e.g.*, Biester v. Evans, 59 Ill. App. 181 (2d Dist. 1894).
15 Annot., 46 A.L.R.2d 848, 872 (1956); Annot., 43 A.L.R. 1103, 1121 (1926).
16 Byerts v. Schmidt, 25 N. Mex. 219, 180 Pac. 284 (1919).
17 202 Ill. App. 43 (1st Dist. 1916).

> of which defendant was ignorant, and that defendant, on due inquiry, was led to believe that he was dealing with an entirely new party and was not to pay commissions and was thereby induced to sell at such lower price, we think the element of good faith is material. It would . . . seem unjust if he acted in good faith in the transaction that he should be mulcted for damages in the form of commissions because of bad faith and deceit practiced upon him by plaintiffs' customer . . . .[18]

In addition to the above exceptions, if the broker's authority expires, or is terminated in good faith, or if the broker abandons his efforts to sell, the broker is not entitled to a commission even if the owner later sells to a buyer originally found by the broker. These matters are discussed in detail in section II(d) of this symposium.

If none of the above exceptions apply, the broker is entitled to recover a commission. It is generally held that when a sale is made by the owner at a lower price than the agent is authorized to offer, the commission allowed is the contract rate on the actual sale price.[19] Thus, in *McConaughy v. Mahannah,* [20] the broker was to receive a 2% commission if he sold at $35 per acre; the defendant sold the property to the broker's prospect at $32 per acre. The court held that the broker was entitled to a 2% commission on the actual selling price.

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[18] 202 Ill. App. at 47. See also, Mears v. Stone, 44 Ill. App. 444 (1st Dist. 1892).
[19] Annot., 46 A.L.R.2d 848, 885 (1956); Annot., 43 A.L.R. 1103, 1122 (1926).
[20] 28 Ill. App. 169 (2d Dist. 1888).