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Conflict of Laws - Brokerage Contracts - Out-of-State Broker Denied Commission Because of Isolated Acts Within Forum

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RECENT DECISIONS

CONFLICT OF LAWS—BROKERAGE CONTRACTS—OUT-OF-STATE BROKER DENIED COMMISSION BECAUSE OF ISOLATED ACTS WITHIN FORUM—Plaintiiff was a Massachusetts real estate broker, not licensed to do business in New York. Defendants, who resided in New York, owned real estate in Massachusetts and executed a brokerage contract there with the plaintiff. The real estate was leased to a Massachusetts corporation through plaintiff's efforts. All of plaintiff's services, with the exception of several important conferences in New York, were performed in Massachusetts. On plaintiff's suit for unpaid commissions, *held,* for defendant. The New York brokerage laws[1] prohibit recovery in a New York court by brokers, unlicensed in New York, who perform any brokerage services within the state. Plaintiff's participation in the New York conferences constituted brokerage services within the meaning of the statute. *Copellman v. Rabinowitz,* 208 Misc. 274, 143 N.Y.S. (2d) 496 (1955).

Real estate brokerage contracts do not involve the transfer of any interest in real estate and are, therefore, not governed by the law of the situs of the land.[2] They are, in effect, employment contracts governed by the conflict of laws rules pertaining to contracts generally.[3] But the courts are not always in agreement as to what law governs such contracts. It has been held that they are governed by the law of the place where the contract was executed,[4] the place where the contract was intended to be performed,[5] and the place intended by the parties to control.[6] Despite this variance in the decisions, the rule most often applied in brokerage contract cases is that the law of the place where the contract was made applies, unless the parties intended that performance be in another and specific jurisdiction, in which

1 49 N.Y. Consol. Laws (McKinney, 1945) §440-a (prohibiting a person from acting as a real estate broker without a license) and §442-d (denying such a person the right to bring an action).

2 Johnson v. Allen, 108 Utah 148, 158 P. (2d) 134 (1945); St. Angel v. Schmid, 4 Ill. App. (2d) 113, 123 N.E. (2d) 642 (1955); 159 A.L.R. 266 at 267 (1945).

3 Frankel v. Allied Mills, Inc., 369 Ill. 578, 17 N.E. (2d) 570 (1938); 159 A.L.R. 266 at 267 (1945).

4 Goldstein v. Scott, 76 App. Div. 78, 78 N.Y.S. 736 (1902); Arnold v. Wilson, (D.C. Tex. 1952) 107 F. Supp. 961. See, generally, GOODRICH, CONFLICT OF LAWS, 3d ed., 321-334 (1949); STUMBERG, CONFLICT OF LAWS, 2d ed., 224-240 (1951). In Cochran v. Ellsworth, 126 Cal. App. (2d) 429, 272 P. (2d) 904 (1954), the court held that the contract was made where the broker found the purchaser. Generally, the forum determines the place of contracting by its own laws. 2 BEALE, CONFLICT OF LAWS §311.2 (1935).

5 Howell v. North, 93 Neb. 505, 140 N.W. 779 (1913); Pratt v. Sloan, 41 Ga. App. 150, 152 S.E. 275 (1930). Cf. Brown & Brammer v. William Pearson Co., 169 Iowa 50, 150 N.W. 1057 (1915), where the court followed the law of place of actual rather than intended performance.

6 Bitterman v. Schulman, 265 App. Div. 486, 39 N.Y.S. (2d) 495 (1943); Frankel v. Allied Mills, note 3 supra; Pritchard v. Norton, 106 U.S. 124, 1 S.Ct. 102 (1882). For decisions indicating that the domicile of the broker should control, see Moore v. Burdine, (La. App. 1937) 174 S. 279; Foley v. Hassey, 55 Wyo. 24, 95 P. (2d) 85 (1939); Reed v. Kelly, (D.C. Wis. 1948) 81 F. Supp. 755. See also 3 RABEL, CONFLICT OF LAWS 202-203 (1950).

case the law of the latter place is applicable.[7] This rule holds true even if it is contemplated that most of the performance will take place at undetermined locales outside the place of making,[8] and even if the performance actually takes place outside the place of making.[9] In the principal case, Massachusetts law would apply under any of these rules since the contract was made in Massachusetts, and most of the performance was contemplated to be and in fact was in that state. However, the court held that it could not enforce the contract since, in pursuance of his obligations under it, the plaintiff violated the New York brokerage laws by engaging in negotiations on the transaction in New York without securing the requisite license. Most courts, faced with a similar fact situation and a similar statute, have held the statute inapplicable on the argument that the acts of the broker within the forum do not amount to "holding oneself out as a broker" within the meaning of the statute.[10] But the cases seldom discuss what acts amount to "holding oneself out as a broker." While some courts may allow a broker to recover commissions even though the whole transaction was performed without a license,[11] others have indicated that they will deny recovery on the basis of a single and isolated act.[12] A number of states now have statutes which expressly prohibit even a single act by an unlicensed broker,[13] and the courts have consistently construed these statutes literally.[14] However, the courts are not nearly so solicitous of statutes prohibiting recovery by an unlicensed broker when such a statute is of a state other than the forum. In such a case, the forum will hold that the laws of the place where the

7 Benedict v. Dakin, 243 Ill. 384, 90 N.E. 712 (1909); Tillman v. Gibson, 44 Ga. App. 440, 161 S.E. 630 (1931); Moore v. Burdine, note 6 supra; Meyer v. Peel, 218 Ark. 750, 238 S.W. (2d) 663 (1951). See 2 BEALE, CONFLICT OF LAWS §§332.3, 332.39 (1935).

8 Bitterman v. Schulman, note 6 supra; Johnson v. Allen, note 2 supra. See 159 A.L.R. 266 at 267 (1945).

9 Detroit & Cleveland Navigation Co. v. Hade, 106 Ohio St. 464, 140 N.E. 180 (1922).

10 Vossler v. Earle, 194 Ill. App. 522 (1915), affd. 273 Ill. 367, 112 N.E. 687 (1916); Folsom v. Young & Young, Inc., (5th Cir. 1954) 216 F. (2d) 352; 86 A.L.R. 640 (1933); 159 A.L.R. 266 at 274 (1945); 169 A.L.R. 767 at 785-787 (1947). However, recent cases have raised some doubt as to this general proposition. See, e.g.: Harris v. Kent House Corp., (D.C. Conn. 1954) 127 F. Supp. 44; Rosenberg v. Rosenblum, 72 Wyo. 91 at 104, 261 P. (2d) 41 (1953); Gilbert v. Edwards, (Mo. 1955) 276 S.W. (2d) 611. See also Cochran v. Ellsworth, note 4 supra, at 907.

11 *Accord,* Sheppard v. Hulseberg, 171 La. 659, 131 S. 840 (1931).

12 See, e.g., Campbell v. Duncan, (D.C. Ark. 1949) 84 F. Supp. 732. However, a mere referral of a purchaser by an unlicensed broker to a licensed broker was held not to violate a brokerage statute in Folsom v. Young & Young, Inc., note 10 supra.

13 E.g.: Ark. Stat. (1947) §71-1302; Ohio Rev. Code (Baldwin, 1953) §4735.01; Tex. Civ. Stat. (Vernon, 1948) art. 6573a; Va. Code (1950) §54-732; Wyo. Comp. Stat. Ann. (1946) §37-2102.

14 Campbell v. Duncan, note 12 supra; Savo v. Miller, (Ark. 1954) 276 S.W. (2d) 67; Gregory v. Roedenbeck, 141 Tex. 543, 174 S.W. (2d) 585 (1943). Where a statute is passed for revenue purposes only, recovery will not be denied. First Nat. Bank of Millstadt v. Freant, (Ill. App. 1955) 129 N.E. (2d) 276. However, the recent trend is to interpret brokerage statutes as an exercise of police power and thus to deny recovery. Benham v. Heyde, 122 Colo. 233, 221 P. (2d) 1078 (1950). See, generally, 169 A.L.R. 767 at 768-775 (1947).

contract was made or the place where it was intended to be performed apply to the whole transaction.[15]

It is not clear whether the court in the principal case intended to hold the contract void or merely to deny the plaintiff a remedy on it. Since New York has some real connection with the contract, it probably has the power to declare it void.[16] Although the language of the statute suggests that it merely denies a remedy, the statute has been construed to make such contracts void.[17] It is submitted that there should be a distinction between the case where the statute of the place of making or intended performance has been violated and where the statute of the place where only isolated acts have been performed has been violated. In the latter case the statute should be interpreted as denying the plaintiff a remedy only in that jurisdiction, on the basis of the state's public policy.[18] In the former case the statute should be construed as voiding the contract for purposes of suit anywhere.[19]

Richard J. Riordan, S. Ed.

[15] St. Angel v. Schmid, note 2 supra; Johnson v. Allen, note 2 supra; Bitterman v. Schulman, note 6 supra; Cochran v. Ellsworth, note 4 supra; Callaway v. Prettyman, 218 Pa. 293, 67 A. 418 (1907). Some courts determine some aspects by the law of the place of making the contract and others by the law of the place of performance. See, e.g.: Osborne v. Dannatt, 167 Iowa 615, 149 N.W. 913 (1914); Louis-Dreyfus v. Paterson Steamships, Ltd., (2d Cir. 1930) 43 F. (2d) 824; Moore v. Burdine, note 6 supra. But cf. Howell v. North, note 5 supra, where a wife's capacity to contract was determined by the law of the place of performance.

[16] See Home Ins. Co. v. Dick, 281 U.S. 397, 50 S.Ct. 338 (1930); GOODRICH, CONFLICT OF LAWS, 3d ed., 333-334 (1949). Such a judgment would have to be given full faith and credit by a sister state. Fauntleroy v. Lum, 210 U.S. 230, 28 S.Ct. 641 (1908).

[17] Frankel v. Allied Mills, Inc., note 3 supra, and cases cited therein at 583. See also Ruiz v. Mendez, (D.C. P.R. 1949) 86 F. Supp. 29.

[18] See Reed v. Kelly, note 6 supra; Moore v. Burdine, note 6 supra. However, Schrier v. Kelloggs Pure Foods, Inc., 205 Misc. 767, 133 N.Y.S. (2d) 751 (1954), seems to suggest that the plaintiff might recover in quantum meruit.

[19] Frankel v. Allied Mills, note 3 supra; Pratt v. Sloan, note 5 supra.