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Duties, Rights, and Remedies of Real Estate Brokers

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NOTE

DUTIES, RIGHTS, AND REMEDIES OF REAL ESTATE BROKERS

Florida's expanding economy is well reflected in the large number of real estate sales being effected throughout the state. The additional housing facilities necessary for the tourist trade and older citizens retiring to Florida from other states and the mounting agricultural and industrial production of the state have resulted in an increased number of real estate transactions. With the increase in sales of realty further litigation may be expected on the vexing questions surrounding the real estate broker's duties, rights, and remedies. It is the purpose of this note to examine some of these problems.

THE BROKER-SELLER CONTRACT

There must be a valid contract between broker and seller before the broker can recover a commission for his services. If the broker is a mere volunteer he cannot recover even though he is the procuring cause of the sale;[1] but if the seller gives the broker some encouragement, as by quoting to him an acceptable price, a contract may be implied.[2]

Two typical seller-broker agreements are the so-called exclusive sale and exclusive listing contracts. Under the former the broker is entitled to his commission if the property is sold by anyone during the life of the contract. This is true even when the property is sold by the owner.[3] Under an exclusive listing contract the broker's commission is protected from a sale by another broker, but the owner may sell his property directly without incurring liability for the commission. A contract granting the broker an exclusive right to sell must be clear and unequivocal.[4] In the absence of such a contract the owner may

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[1]Howell v. Blackburn, 100 Fla. 114, 129 So. 341 (1930) (evidence that owner offered to sell the property to broker insufficient to imply a listing); City Builders Finance Co. v. Stahl, 90 Fla. 357, 106 So. 77 (1925). The contract of an unregistered broker is invalid, FLA. STAT. §475.41 (1953).

[2]Taylor v. Dorsey, 155 Fla. 305, 19 So.2d 876 (1944).

[3]See, *e.g.*, Pearce v. Previews, Inc., 201 F.2d 385 (5th Cir. 1953).

[4]See South Florida Farms Co. v. Stevenson, 84 Fla. 235, 93 So. 247 (1922).

always sell his own property without becoming liable for a commission.[5] The Florida Supreme Court has had occasion to rule on such a contract in only one instance.[6] In that case the broker's only effort at selling the property had been the insertion of an advertisement in a newspaper one day before a direct sale by the owner. Even though the buyer had not seen the advertisement, the broker was allowed to recover. The Court found a bilateral contract, the consideration being the mutual promises of the owner to employ the broker and of the broker to make an effort to sell the property.[7]

The broker's right to a commission often turns on whether his contract with the seller requires him to sell the property or merely to find a ready, willing, and able purchaser.[8] To be entitled to his commission under a contract to sell, the broker must have[9]

> ". . . effected a completed sale of the property, pursuant to [his] authority, i.e., the deed must have been executed and delivered by the seller, and the proper cash payment made, and mortgage and note or notes executed and delivered by the purchaser for the balance; or the broker must have procured from his customer a binding contract of purchase within the terms of his authority, i.e., a written contract which the [seller] could enforce, leaving nothing for the [seller] to do on his part but to execute at the proper time the necessary transfer of the title to the property."

Under neither type of contract may a broker execute an agreement binding his principal to sell unless his authority to do so is clearly set out.[10]

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[5]*Ibid.*

[6]Flynn v. McGinty, 61 So.2d 318 (Fla. 1952).

[7]*Id.* at 320.

[8]"[Financially] 'able' means that the proposed purchaser is able to command the necessary money to close the deal on reasonable notice or within the time stipulated." Perper v. Edell, 160 Fla. 477, 485, 35 So.2d 387, 391 (1948).

[9]Malever v. Livingston, 95 Fla. 272, 276, 116 So. 15, 17 (1928). This case expressly clarifies the earlier important, but not too clear, opinion in Wiggins v. Wilson, 55 Fla. 346, 45 So. 1011 (1908). See also Weida v. Bacon, 102 Fla. 628, 138 So. 32 (1931); Hart v. Pierce, 98 Fla. 1087, 125 So. 243 (1929); Elliott v. Gamble, 77 Fla. 798, 82 So. 253 (1919); Waters Realty Co. v. Miami Tripure Water Co., 100 Fla. 221, 129 So. 763 (1930).

[10]Dwiggins v. Roth, 37 So.2d 702 (Fla. 1948); Holmberg v. Queck, 90 Fla. 437, 105 So. 817 (1925); Rhode v. Gallat, 70 Fla. 536, 70 So. 471 (1915).

The right to a commission is more easily established under a contract to find a purchaser, because it is not essential to the broker's case that the sale be consummated. The broker has completed his part of the contract when he has found a ready, willing, and able purchaser and has presented him to the seller.[11] Should the transaction be subsequently defeated through some fault of the seller, the broker can nevertheless recover.[12] When the broker has found a buyer he need only exercise good faith in notifying the seller that the buyer is his customer; he is not required to introduce the buyer to the seller, nor need he send a letter of introduction or his business card.[13]

Brokers' Remedies

Although the usual remedy for the broker who has completed his part of a contract with a seller is a contract action for damages, other devices may be available to him.

Equitable Lien

Although the Florida Supreme Court has never granted this remedy, it has indicated by dictum that the broker may protect his commission by an equitable lien on the property involved in the sale when the buyer has agreed to pay the commission as a part of the purchase price.[14] Ordinarily the buyer discharges his entire liability by payment of the purchase price to the vendor.[15] The broker has been denied an equitable lien in a case in which the buyer and seller conspired to defraud him of his commission[16] and in another case in which the seller violated his contract by letting another broker handle the sale.[17] In neither of these cases, however, had the buyer agreed to pay the broker's commission as part of the purchase price.

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[11]Waddell v. J. P. Holbrook Co., 108 Fla. 332, 147 So. 213 (1933).

[12]Hutchins & Co. v. Sherman, 82 Fla. 167, 89 So. 430 (1921).

[13]See Pensacola Finance Co. v. Simpson, 82 Fla. 368, 90 So. 381 (1921). *Contra,* Wiggins v. Wilson, 55 Fla. 346, 45 So. 1011 (1908) (notice of seller that buyer is broker's customer insufficient unless the broker indicates that to his knowledge the customer is ready, willing, and able to purchase on seller's terms).

[14]Moss v. Sperry, 140 Fla. 301, 315, 191 So. 531, 537 (1939) (dictum).

[15]Moss v. Sperry, 140 Fla. 301, 191 So. 531 (1939).

[16]Moss v. Sperry, *supra* note 15; Nicol v. Bressler, 159 Fla. 668, 32 So.2d 457 (1947).

[17]Steinhardt v. Koeppel, 158 Fla. 253, 27 So.2d 340 (1947).

Equitable Attachment

This remedy has been made available to the broker in only one Florida case.[18] The purchaser and the nonresident owners had fraudulently conspired to avoid payment of the plaintiff broker's commission, lowering pro tanto the cost to the purchaser. The contract between the owner and the broker called for payment of the commission out of "the first monies paid by the purchaser." The Court, after denying the right of the broker to enforce an equitable lien for his unpaid commission, reasoned that the unpaid purchase money was in the nature of a particular fund and, on the basis of an 1871 case,[19] held that the broker had an equitable interest in the fund that could be protected by an equitable attachment of the land involved.

EFFECT OF CHANGING THE TERMS OF THE SALES CONTRACT

The Florida Court formerly held that in order for the broker to recover on a contract to make a sale[20] or to find a purchaser[21] for a particular price the property must have been sold for the price agreed upon. The present rule is that when the broker brings the parties together and through continuous negotiations a sale is consummated the broker is entitled to his commission even though the terms of the sale are changed by mutual consent of the buyer and seller. This is true whether the broker is employed under an express or implied contract,[22] or whether the contract is one requiring the broker to make a sale[23] or to find a purchaser.[24] In the recent case of *Shuler v. Allen*[25]

[18]Moss v. Sperry, 140 Fla. 301, 191 So. 531 (1939).

[19]Broome v. Bisbee, 14 Fla. 21 (1871).

[20]Rickmers v. Tuckerman, 80 Fla. 839, 87 So. 53 (1920); Varn v. Pelot, 55 Fla. 357, 45 So. 1015 (1908); Wiggins v. Wilson, 55 Fla. 346, 45 So. 1011 (1908); Waters Realty Co. v. Miami Tripure Water Co., 100 Fla. 221, 225, 129 So. 763, 765 (1930) (dictum). The *Wiggins* and *Varn* cases were decided principally on procedural grounds in that the contract pleaded and the one attempted to be proved were at variance.

[21]Strano v. Carr & Carr, Inc., 97 Fla. 150, 119 So. 864 (1929); Wiggins v. Wilson, *supra* note 20.

[22]Taylor v. Dorsey, 155 Fla. 305, 19 So.2d 876 (1944).

[23]Parrish v. Tyre, 59 So.2d 250 (Fla. 1952).

[24]Katz v. Bear, 52 So.2d 903 (Fla. 1951) *(semble);* Sunshine v. Golden Arms Apts. Corp., 47 So.2d 1 (Fla. 1950) (commission allowed though stock of corporation holding real property was transferred instead of title to the property); Taylor v. Dorsey, 155 Fla. 305, 19 So.2d 876 (1944).

[25]76 So.2d 879 (Fla. 1955).

the Court stated by way of dictum that the "continuous negotiations" contemplated in this rule are negotiations between the owner and the purchaser carried on through the medium of the broker.[26] The requirement has been more relaxed in other situations. In one case the Court required only that the broker keep the prospect interested in the property,[27] and in another that the broker need only inaugurate the negotiations.[28]

Effect of Conditions

A broker employed to make a sale for a particular price does not thereby guarantee to the seller that he will collect the entire sales price.[29] Even if after the sale is made the broker voluntarily agrees to wait for his commission until the installments on the purchase price have been paid by the buyer, the broker is free to repudiate this agreement and recover his full commission at once.[30] If, however, there is incorporated in the contract a condition precedent, the condition must be performed before the contract can be enforced.[31] A contract may be worded in such a manner that the broker's commission is payable in installments, part from the first money received and part conditioned on the buyer's paying the remainder of the purchase price. Under such contracts a seller is not liable for a commission if the buyer defaults[32] or the seller is forced to foreclose.[33] The same result

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[26]*Id.* at 883.

[27]Cumberland Sav. & Trust Co. v. McGriff, 61 Fla. 159, 54 So. 265 (1911).

[28]Parrish v. Tyre, 59 So.2d 250, 254 (Fla. 1952).

[29]See Durham Tropical Land Corp. v. Sun Garden Sales Co., 106 Fla. 429, 138 So. 21 (1931).

[30]McGehee Lumber Co. v. Tomlinson, 66 Fla. 536, 63 So. 919 (1913) (seller had subsequently denied any liability for commission).

[31]*E.g.*, Hensley Ins. Co. v. Echols, 159 Fla. 324, 31 So.2d 625 (1947) (failure of broker to get written consent of seller's wife to sell homestead); Stoy v. Berg, 96 Fla. 858, 119 So. 139 (1928) (first $5,000 binder to reach seller subject to terms gets property); Merrick v. Martens, 88 Fla. 20, 102 So. 747 (1924). As to the implied condition of performance within a reasonable time, *compare* Lowe v. Crawford, 97 Fla. 673, 122 So. 11 (1929) (recovery of commission when sale was made immediately after buyer returned from a trip), *with* Shuler v. Allen, 76 So.2d 879 (Fla. 1955) (no recovery when sale was made after a 16-month period).

[32]Watrouse v. Jones, 94 Fla. 1120, 114 So. 759 (1927); Chambers v. Armour, 78 Fla. 577, 83 So. 721 (1919).

[33]Murphy v. Green, 102 Fla. 102, 135 So. 531 (1931) (commission payable "subject to terms and conditions of sale").

will be reached if the buyer reconveys the land to the seller to avoid foreclosure.[34]

A person may not relieve himself of an obligation by preventing the happening of a condition upon which his liability depends.[35] Thus a seller who employs a broker under a contract to make a sale may not defeat the broker's right to a commission by unreasonably refusing to complete the transaction.[36]

The broker does not bear the risk of the seller's having a bad title. A broker was held entitled to his commission when a purchaser had made a down payment, even though the sale was never consummated because of a defect in the seller's title.[37] In another case, in which the seller had referred the broker to the tax records for a description of the land, the broker was allowed a commission for signing a purchaser to an otherwise binding contract of sale based on the description, though the transaction was never completed because of a discrepancy of footage in the property boundaries.[38] In another case in which a broker was employed to sell an entire tract of land, he recovered a commission for the sale of the whole even though a part of the tract was not sold because of a defect of title.[39]

Broker's Duty to Seller

The real estate business has become a highly specialized one; the broker has a quasi-fiduciary position and is often a confidant of the public. The law requires that the broker conduct his transactions with his clients in a manner worthy of this confidence, and when he fails he will be suspended or his license revoked.[40] It is presumed that the broker has no interest other than as a broker; if he asserts other interests the burden is on him to prove that he acted in good faith

[34]Seminole Fruit & Land Co. v. Rosborough-Weiner, Inc., 43 So.2d 864 (Fla. 1950); Langford v. King Lumber & Mfg. Co., 123 Fla. 855, 167 So. 817 (1935).

[35]Walker v. Chancey, 96 Fla. 82, 117 So. 705 (1928).

[36]Hart v. Pierce, 98 Fla. 1087, 125 So. 243 (1929); Walker v. Chancey, *supra* note 35.

[37]Waddell v. J. P. Holbrook Co., 108 Fla. 332, 147 So. 213 (1933).

[38]Sullivan v. Brown, 67 Fla. 133, 64 So. 455 (1914).

[39]R. J. & B. F. Camp Lumber Co. v. Tedder, 78 Fla. 183, 82 So. 865 (1919). *But cf.* Wester v. McNeill, 101 Fla. 944, 134 So. 55 (1931).

[40]Ahern v. Florida Real Estate Comm'n, 149 Fla. 706, 6 So.2d 857 (1942). For an applicant to receive a real estate broker's license he must be honest, truthful, trustworthy, of good character, and have a good reputation for fair dealing, Fla. Stat. §475.17 (1953).

and that his client knew of the other interests at the time of employment.[41]

If, after being employed as an agent to negotiate a purchase, a broker purchases the land in his own name, the Court will impose a constructive trust in favor of the principal.[42] But in a case in which it was necessary for the broker to buy more land in order to obtain that desired by the purchaser, the broker had to account only for the profits on the land desired by the principal rather than the entire purchase.[43]

The broker owes a duty to his employer to keep him informed of all the material facts concerning the negotiation. If he allows the buyer to approach the seller direct, knowing that the buyer is prepared to pay a certain price, and fails to so inform the seller, he will forfeit his right to compensation even though the seller obtains the original price asked.[44] In *Pensacola Finance Co. v. Simpson*,[45] however, the seller made an offer prior to being notified that he was dealing with the broker's customer. It was held that the fact that the seller withdrew the original offer and subsequently made one at the same price after having been notified did not prevent his being liable for a commission.

Broker's Duty to Buyer

In the past the Florida Court has said that the broker was the seller's agent and hence owed no duty to the buyer; the rule of caveat emptor was applied so as to prevent liability to the buyer.[46] In later cases the Court has completely disaffirmed this line of reasoning; now the broker will be held liable if he has interests conflicting with those of the buyer. The Court has held that, even if the broker represents himself as the agent of the seller, by handling the financial arrangements and other details he also becomes the agent of the buyer and therefore liable for any profits.[47] In a more recent case[48]

[41]Gabel v. Kilgore, 157 Fla. 420, 26 So.2d 166 (1946); The Burnham City Lumber Co. v. Rannie, 59 Fla. 179, 52 So. 617 (1910).

[42]Quinn v. Phipps, 93 Fla. 805, 113 So. 419 (1927).

[43]Tucker v. Lacey, 160 Fla. 564, 35 So.2d 724 (1948).

[44]Carter v. Owens, 58 Fla. 204, 50 So. 641 (1909).

[45]82 Fla. 368, 90 So. 381 (1921). *But cf.* The Skinner Mfg. Co. v. Douville, 57 Fla. 180, 49 So. 125 (1909); Wiggins v. Wilson, 55 Fla. 346, 45 So. 1011 (1908).

[46]Huttig v. Nessy, 100 Fla. 1097, 130 So. 605 (1930).

[47]Van Woy v. Willis, 153 Fla. 189, 14 So.2d 185 (1943).

[48]Zichlin v. Dill, 157 Fla. 96, 25 So.2d 4 (1946).

the Court said that, even though an agent is ordinarily liable only to his principal, by Florida statute[49] the real estate broker has been given a monopoly to engage in a lucrative business, and he may not employ the defense of caveat emptor to defeat a buyer's action against him.

Conclusion

The Florida Court now has a more liberal attitude toward allowing the broker a commission than ever before. It has moderated the requirement that the broker find a buyer who will accept the exact terms agreed upon in the broker's contract with the seller. Unless sale at fixed price is clearly set forth as a condition precedent to payment of the commission, the broker who introduces a ready, willing, and able purchaser to the seller has earned his reward.

Since the turn of the century there have been over two hundred cases considered by the Florida Supreme Court on the issue of whether the broker has a right to a commission. There are surely scores of others that were not appealed. Nor is there any evidence that today fewer controversies are being carried to the courts than in the past. Why is it that such a substantial amount of judicial time is taken up with this one question? One reason lies in the complexity of the problem itself. There are always at least three parties involved – the buyer, the seller, and the broker. But another reason may lie in some flaw in the ordinary business practice of the broker. There is no apparent indication that brokers are using a standard form contract covering in detail all the rights and liabilities of the parties. Perhaps real estate brokers avoid such contracts because of the tendency of the courts to construe form contracts against the maker.

As a step toward the elimination of the maze of litigation, it is suggested that a study be made of the standard form contracts used by brokers in other states. If successful elsewhere, appropriate instruments could be drawn for state-wide use in Florida. Of course triable issues would arise and unusual fact situations would need judicial determination. But once a form has obtained judicial sanction and has been revised to meet the peculiarities of Florida law, its use would prevent much litigation and would benefit both landowners and brokers.

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[49] Fla. Stat. §475.01 (1953).