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When Is Termination Of Realty Broker'S Agency In Bad Faith?

that since the Uniform Commercial Code does not accept the present majority rule, the possibility exists that the present majority rule may well become the minority in the ensuing years.

KENNETH O. HUNTINGDON, JR.

WHEN IS TERMINATION OF REALTY BROKER'S AGENCY IN BAD FAITH?

When a real estate broker finds that after his agency has been terminated his principal has sold the property involved to the same person he had previously produced, the broker may well feel that he has been deprived of a commission unfairly. If he seeks to recover the commission by litigation, it is likely that he will have to prove that the principal terminated the agency in bad faith.[1]

In a recent Maryland decision, *Leimbach v. Nicholson*,[2] the possibility of a principal's acting in bad faith in terminating an agency relationship divided the state's highest court. Leimbach employed Nicholson to sell his farm, agreeing to consider any offer procured. During a period of five or six months Nicholson tried to effect a sale with the eventual purchaser, but was unsuccessful in doing so because of price differences and prejudices expressed by Leimbach against the purchaser's religion. Thinking that a satisfactory arrangement was impossible at the time, Nicholson tried to interest the prospective buyer in adjoining property. At about this time, Myerberg, another real estate broker and a close friend of the buyer, brought the buyer to Leimbach, and within a period of approximately six weeks the sale was consummated. The sale was made at a higher price than any offer Nicholson had been able to obtain.[3] Myerberg purchased in

[1]"An agent to whom the principal has made a revocable offer of compensation if he accomplishes a specified result is entitled to the promised amount if the principal, in order to avoid payment of it, revokes the offer and thereafter the result is accomplished, the agent's prior efforts being the effective cause thereof." Restatement, Agency § 454 (1933). See also Mechem Outlines Agency § 565 (4th ed. 1952).

The theory of this rule of law is that a special or fiduciary relationship exists which affords the principal the power and means to take undue advantage of, or exercise undue influence over, the agent. A course of dealing between persons so situated is carefully scrutinized, and if the slightest trace of undue influence or unfair advantage is found, redress is given to the injured party. Jordan v. Annex Corp., 109 Va. 625, 64 S.E. 1050 (1909).

[2]219 Md. 440, 149 A.2d 411 (1959).

[3]The testimony showed that Nicholson submitted three offers on behalf of the eventual purchaser, the last being $115,000, which was $5,000 more than the previous offer and $15,000 more than the first. The sale was effected at the price of $127,500 less $5,000 commission, or a net to Leimbach of $122,500. Id. at 413-14.

his own name and then assigned to the purchaser, who was the customer originally produced by Nicholson. Additional facts tended to establish that Nicholson was still negotiating with the buyer at the time of the sale, and any abandonment or cessation of activity on his part was induced by the misrepresentations made by Leimbach as to his views regarding the buyer's religion. The jury awarded Nicholson $5,000 as a commission.

The majority of the Supreme Court of Appeals recognized that a sale made subsequent to the termination of the agency to a customer initially produced by a real estate broker ordinarily gives rise to an inference that the termination was made in bad faith. However, the court held that this inference arises only when the sale is made at a lower price than the offer obtained by the broker. When the sale is made at a *higher* price than that procured by the broker, no inference of bad faith arises. Neither Myerberg nor Leimbach had any obligation to deal through Nicholson since there was no exclusive agency involved; and even if the evidence permitted an inference that Leimbach knew that the buyer was the customer produced by Nicholson, the result would not be altered. In order to recover, Nicholson must show facts sufficient to support an allegation of bad faith. The majority of the court held that as a matter of law Nicholson had not done this and that therefore the trial court should not have submitted the issue to the jury.

The dissent took the view that the court could not say, as a matter of law, that the broker (Nicholson) was not the procuring cause of sale to the ultimate purchaser because it could not say, again as a matter of law, that Leimbach had in good faith discharged the broker or that the broker had withdrawn voluntarily. The dissent thought that the decisive inquiry was whether the principal acted in good or bad faith regardless of whether the sale was at a higher or a lower price, and that this question of bad faith should be determined by a jury.[4]

The real estate broker is usually a "special agent" and as such is in a relatively weak position so far as his scope of authority and security

[4]A broker who is the procuring cause of a transaction consummated by the principal is entitled to a commission, even though the principal accepts property in lieu of cash, Kroh v. Rosenberg, 158 Md. 273, 148 Atl. 244 (1930), makes a sale at a higher price or on better terms than he had authorized, Flournoy v. Atlas Oil Co., 151 La. 222, 91 So. 714 (1922), sells at a lower price than that originally quoted by him to the broker, Mitchell v. Hughes, 143 Va. 393, 130 S.E. 225 (1925), or although the transaction consummated includes more or less property than the broker was authorized to sell, purchase, or exchange, Belyeu v. Hudson, 179 Ark. 657, 17 S.W.2d 865 (1929).

of employment are concerned.[5] In the absence of a contract to the contrary, the principal may terminate the agency at will, sell directly, and authorize third parties to compete with the agent. Therefore, in order to afford the broker some protection by way of adequate compensation for his time and effort, courts require that the termination of an agency be made in good faith. This requirement is strictly adhered to, and when bad faith is found the courts do not hesitate to award commissions to the agent. The problem presented in applying this doctrine is the determination of what comprises good or bad faith.[6] While this problem remains unsettled, the ultimate question is usually whether the real estate broker is the procuring cause of sale.[7]

There are comparatively few cases in which the agency was terminated with the principal subsequently selling, directly or through a third party, at a price higher than the broker could obtain. The majority of these cases conform to the view expressed by the dissent in *Leimbach, i.e.,* that the question of good or bad faith is one for the jury.[8] This is illustrated by the leading New York case of *Goodman*

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[5]"[Real estate agents] are usually special agents, and their authority is to be deemed to be strictly limited to that which is either expressly given or necessarily implied." 1 Mechem, Agency § 799 (2d ed. 1914). See generally Id. at 797-99. Accord, Swift v. Erwin, 104 Ark. 459, 148 S.W. 267 (1912).

[6]Black, Law Dictionary (4th ed. 1951) defines bad faith as: "The opposite of 'good faith,' generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive." See also New Amsterdam Cas. Co. v. National Baking Co., 117 N.J. Eq. 264, 175 Atl. 609 (1934) (bad faith distinguished from negligence).

[7]Restatement, Agency § 445, comments c, e, § 448 (1933); 2 Mechem, Agency § 2435 (2d ed. 1914). See generally Id. at §§ 2430-35, 2442. Accord, Seward v. M. Seward & Son Co., 91 Conn. 190, 99 Atl. 887 (1916); 21 Tul. L. Rev. 137 (1946).

"In the common case of a real estate agent or broker, the ordinary business understanding, and, therefore, the ordinary rule of law is that the agent becomes entitled to his commission when he has procured for his client one who is able and ready and willing to contract with the client on the terms which the latter has stated to his agent." 4 Williston, Contracts § 1030A (rev. ed. 1936). See also Shea Realty Corp. v. Page & Taylor, 111 Va. 490, 69 S.E. 327 (1910). However, when the agency is terminated in bad faith for the purpose of defeating the broker's right to commissions, the question of procuring cause of sale does not arise. O'Connell v. Casey, 206 Mass. 521, 92 N.E. 804 (1910) (leading case).

[8]Restatement, Agency § 454 (1933); 2 Mechem, Agency § 2435, 2442 (2d ed. 1914). "The 'bad fath'... appears to mean no more than that the owner is deliberately trying to get the broker's services for nothing, either to avoid payment of the promised commission, or to give the benefit thereof to a favored buyer or another broker. Where such a scheme is charged, it will be a question of fact—and often a very difficult one." Mechem Outlines Agency § 566 (4th ed. 1952). Accord, Tahir Erk v. Glenn L. Martin Co., 143 F.2d 232 (4th Cir. 1944); Houston

v. Marcol.[9] In that case the broker reported to the seller that he had received a better offer from his prospective customer. Upon learning this, the principal terminated his authority and consummated the sale through another broker at the higher price but at a lower broker's commission. In awarding the dismissed broker his commission the court said: "We think that questions of fact arose which required a submission of the case to the jury."[10] Inferences of bad faith are much more readily discernible as in this New York case than in the following cases: when a real estate agent was employed to sell land at a certain price with a specified sum as his commission and the principal terminated the agency before the expiration of a reasonable time, selling directly to the customer produced by the agent;[11] when the principal sold directly to the dismissed broker's customer a few days after the agency had been terminated at a price greater than that authorized to the broker;[12] and when the principal rejected the offer of the broker's prospect, terminated the agency, and several weeks later sold the property through another broker at a higher price to the dismissed broker's customer.[13] In each of these cases the jury awarded the broker his commission. Cases have denied the dismissed broker his commission when the principal gave the broker a fixed or extended date in which to produce a purchaser and the broker failed to produce at that time;[14] when the broker failed to comply with the terms of a special agency contract;[15] when the customer produced by the broker was not ready, willing, and able to purchase upon the principal's terms;[16] and when the broker had not carried the negotiations far enough to establish himself as the procuring cause of sale, as he had merely introduced the eventual purchaser to his principal.[17] It

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v. H. G. Wolff & Son Inv. Co., 94 Colo. 73, 28 P.2d 255 (1933); Chicago Title & Trust Co. v. Guild, 329 Ill. App. 374, 68 N.E.2d 615 (1946); Baskett v. Jones, 189 Ky. 391, 225 S.W. 158 (1920); Steele v. Seth, 211 Md. 323, 127 A.2d 388 (1956); Goodman v. Marcol, Inc., 261 N.Y. 188, 184 N.E. 755 (1933); Shea Realty Co. v. Page, 111 Va. 490, 69 S.E. 327 (1910). See Annot., 27 A.L.R.2d 1348 (1953).

[9]261 N.Y. 188, 184 N.E. 755, 756 (1933).

[10]Id. at 756.

[11]Holland v. King, 72 Ga. App. 179, 33 S.E.2d 275 (1945).

[12]McCarthy v. McCarthy, 49 R.I. 200, 142 Atl. 142 (1928).

[13]O'Connell v. Casey, 206 Mass. 520, 92 N.E. 804 (1910). See also Viguerie v. Mathes, 10 La. App. 246, 120 So. 542 (1929).

[14]Neal v. Lehman, 11 Tex. Civ. App. 461, 34 S.W. 153 (1895).

[15]Deckker v. Klingman, 149 Mich. 96, 112 N.W. 727 (1907) (option contract).

[16]E. A. Strout Realty Agency v. Gargan, 328 Mass. 524, 105 N.E.2d 208 (1952).

[17]Zeimer v. Antisell, 75 Cal. 509, 17 Pac. 642 (1888); Sibbald v. Bethlehem Iron Co., 83 N.Y. 378, (1881); Ford v. Gibson, 191 Va. 96, 59 S.E.2d 867 (1950). But see Wachtel v. Harkless, 112 Ind. App. 279, 44 N.E.2d 510, 512 (1942), stating that "introduced" was equivalent to "procured."

should be noted that even in these cases in which recovery was denied the questions of bad faith and procuring cause of sale were held to be questions of fact for the jury.

In cases in which there is an allegation of bad faith, appellate courts have proceeded with caution in overruling a jury's finding of fact. The reason appears to be that the fertility of man's invention in devising new schemes of fraud is so great and the position of the principal so superior to the broker's that reasonable men could easily differ on inferences permissibly flowing from the testimony of the parties.[18] The rule laid down by *Leimbach* would appear harsh because whenever the sale is at a *higher* price than the dismissed broker could obtain, the inferences of bad faith and that the dismissed broker was the procuring cause of sale may never arise. This rule appears to differ from that of the other cases on point with *Leimbach*. The writers also agree that the decisive inquiry of good or bad faith is a question of fact for the jury.[19]

In holding as a matter of law that the facts were insufficient to permit any inference of bad faith a court accepts as true all testimony and fair inferences favorable to the right of the broker to recover.[20]

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[18]See Leach v. Central Trust Co., 203 Ia. 1060, 213 N.W. 777 (1927); Warfield Natural Gas Co. v. Allen, 248 Ky. 646, 59 S.W.2d 534 (1933). See also 23 Am. Jur. Fraud & Deceit §§ 1-19 (1939); Annot., 27 A.L.R.2d 1348 (1943).

[19]See, e.g., 2 Mechem, Agency §§ 2435, 2442 (2d ed. 1914). Accord, Shannon v. Gaar, 233 Iowa 38, 6 N.W.2d 304 (1942); Clinchy v. Grandview Dairy, Inc., 262 App. Div. 51, 27 N.Y.S.2d 793 (1941); Feeley v. Mullikin, 269 P.2d 828 (Wash. 1954).

[20]There are two possible tests that can be made to prevent a jury from disregarding the applicable substantive law: (1) the prevailing view in this country is that in passing upon a motion for a directed verdict the trial judge considers only the evidence favorable to the respondent, completely disregarding all unfavorable evidence, and determines whether a reasonable jury, from the evidence viewed in its most favorable light for the respondent, could find every fact exists which must exist to sustain his case; (2) the trial judge may direct a verdict against the respondent upon all the evidence in the case, i.e., evidence both favorable and unfavorable to the respondent, and if the judge determines, although there is evidence of every fact which the respondent must establish, that he would be duty bound to set aside a verdict for the respondent should the jury return one for him because it would be against the weight of the evidence. The latter is the minority view and might be considered undesirable because under it the judge passes on the credibility of witnesses. See Note, 31 Calif. L. Rev. 454, 460 (1943). Maryland adheres to the prevailing view. Ebling v. Brewer, 154 Md. 290, 141 Atl. 363 (1928).

"It is the established rule that in passing upon whether there is sufficient evidence to submit an issue to the jury we need look only to the evidence and reasonable inferences which tend to support the case of a litigant against whom a peremptory instruction has been given." Wilkerson v. McCarthy, 336 U.S. 53, 57 (1949) (expressing the prevailing view). See also Pennsylvania R.R. v. Chamberlain, 288 U.S. 333 (1933). When it is said that there is no evidence to go to the jury, this is not literally true, but only means that there is none that should reasonably satisfy a jury that the fact sought to be proved is established. Blum v. Fresh

It is doubtful if this was done in *Leimbach*. For example, it is doubtful whether the agency was actually terminated. Nicholson contended and Leimbach admitted that if Nicholson had in fact abandoned the agency this was due to Leimbach's arbitrary, if not bad faith, misrepresentation that he would not sell to the customer produced by Nicholson.[21] It would seem that it may be reasonably inferred from these facts that Nicholson's efforts were thwarted by Leimbach, and as the *Goodman* case stated on this point, "[N]o one can avail himself of the non-performance of a condition precedent, who has himself occasioned its non-performance."[22] The customer produced by Nicholson did in fact buy Leimbach's farm; therefore, he was surely more than casually interested in the property. An introduction of the eventual purchaser to the principal without more is insufficient to establish the broker as the procuring cause of sale.[23] However, it may be fairly inferred from the broker's testimony that he carried the negotiations as far as he was able before Leimbach's interference. Therefore, the jury should be allowed to determine the issue.[24] If Leimbach had not manifested such strong prejudices against the purchaser, it appears likely that Nicholson would have been able to effect the sale; such an inference flows from the testimony.[25]

Anyone who relies upon the existence of agency has the burden of proving it. He must not only prove that it exists, but he must show the type of agency.[26] When alleging a fraudulent or bad faith agency termination, the agent must allege facts sufficient to substantiate his claim. *Leimbach* appears to lay down a rule of doubtful validity in denying that ordinary inferences of bad faith do not arise when a subsequent sale is made at a *higher* price.

PAUL H. COFFEY, JR.

Grown Preserve Corp., 292 N.Y. 241, 54 N.E.2d 809 (1944). See also Croft v. Snidow, 183 Va. 649, 33 S.E.2d 208 (1945) (demurrer to the evidence); Klingstein v. Eagle, 193 Va. 350, 68 S.E.2d 547 (1952) (motion to strike the evidence).

[21]149 A.2d at 413.

[22]184 N.E. at 756.

[23]See cases cited note 17 supra.

[24]149 A.2d at 413.

[25]The facts in Leimbach, see note 5 supra, appear to allow a fair inference that the customer produced by Nicholson was so interested in Leimbach's property that he continually increased his offer. Therefore, the consummation of a sale appeared to be immediately foreseeable and was thwarted only by the religious prejudices of Leimbach against the customer. This inference is further strengthened by the fact that the customer did in fact buy the property. Therefore, Leimbach appears to come under the rule of the O'Connell case, note 21 supra.

[26]See 1 Mechem, Agency §§ 50, 69 (2d ed. 1914).