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Agency: Auctioneer's Duty To Disclose Material Facts of Agency To Seller

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RECENT DECISIONS

Agency — Auctioneer's Duty to Disclose Material Facts of Agency to Seller — Defendant, an auctioneering corporation, sold the farm of the plaintiff to a purchaser whom it financed. Although the president of defendant, who acted as auctioneer at the sale, was cognizant of the agreement between it and the purchaser, the plaintiff at no time prior to the sale was informed of this arrangement. There was no showing of fraud or damages. The sale price was below that stipulated by the seller, yet the seller was present when the farm was knocked down and he knew to whom it was being sold. A commission for the sale of the farm was retained by the defendant from the proceeds of personalty sold at the same auction. The auctioneer tendered the net proceeds of the sale to the plaintiff who rejected the amount offered for the farm and demanded that the total commission be refunded. *Held:* an agent is in a fiduciary relation to his principal which results in a duty to disclose every material fact relating to the agency. Where there is a non-disclosure of a material fact relating to the agency, though there is a showing of neither fraud nor damages, the agent forfeits the right to any commission. *Faultersack v. Clintonville Sales Corporation, 253 Wis. 432, 34 N.W. (2d) 682 (1948).*

The duties of an auctioneer to the seller are those of an agent to the principal. In the absence of agreement to the contrary, the auctioneer is agent primarily for the seller.[1] There is little dispute concerning the principles regulating this relationship. Being an agent, the auctioneer must act in the interest of his principal with the highest degree of good faith.[2] To act in the interest of the seller demands that every material fact pertinent to the agency must be disclosed to the principal.[3] The duty of disclosure is a common law principle not dependent on statute[4] and failure to comply with it results in a loss of all commissions to the agent.[5]

Although courts generally are very lenient to the principal in the application of the foregoing rules, interpretation of what constitutes a "material fact" may vary. Non-disclosure in the following instances resulted in a loss of commissions. Where the agent did not disclose to the principal that another individual was acting as sub-agent, the agent was not allowed a commission when the principal, believing himself to be the procuring cause, contracted with a purchaser, when, in fact, the sub-agent had been the procuring cause.[6] Failure to disclose to the

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[1] Veazie v. William, 8 How. 134 (U.S. 1850).
[2] 2 Am. Jur. 203
[3] 2 Am. Jur. 204
[4] Blum v. Fleishhacker, 21 F.Supp. 527 (1937).
[5] Restatement of the Law of Agency, Sec. 299(k).
[6] Hustad v. Drives, 181 Wis. 87, 193 N.W. 984 (1923).

seller that unannounced by-bidders of a foreclosing mortgagee were present precluded an auctioneer from receiving commissions.[7] Forfeiture of commissions resulted where the agent sold land to a third person without disclosing purchaser's name to the principal when agent knew that the principal would not have sold to that individual.[8] Architects were denied all compensation for commission when, without notifying their principal, they subcontracted with engineers who were to make no charge for drawing up specifications covering the mechanical equipment of the building if they obtained the contract for the work.[9] So likewise a sale to an association of which the auctioneer is a member.[10] Where three men contracted to act as auctioneers for the seller, a sale to one of these men who at the auction acted as agent for an undisclosed principal without informing the seller was held to be such a breach of duty.[11] An agent also forfeited his commissions when he contacted two others with the intention that they become bidders at the sale.[12]

There is a breach of duty for non-disclosure of a material fact despite the fact that neither fraud nor damages are shown, the reason being offered that the principle is preventive rather than curative.[13] The following quotation is applicable to the agent's duty to disclose although it was made where the agent acted as an adverse party to his principal.

> "The salutary object of the principle is not to compel restitution in case fraud has been committed or an unjust advantage gained but to elevate the agent to a position where he cannot be tempted to betray his principal. Under a less stringent rule, fraud might be committed, or unfair advantage taken, and yet, owing to the imperfection of the best of human institutions, the injured party be unable to discover it, or prove it in such a manner as to entitle him to redress."[14]

Nor does a gratuitous agency alter the duty of the agent.[15]

However, the auctioneer, without disclosing to his principal, may bid a particular sum for a purchaser when it amounts to no more than receiving the bid prior to the sale.[16] It is to be noted that the Restatement of Agency posing the fact situation of the main case, would not

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[7] Hatfield v. Corbin Bldg. Supply Co., 279 Ky. 30, 129 S.W.(2d) 1025 (1939). (alternative holding).

[8] Partee v. Crawford, 173 Miss. 732, 163 So. 389 (1935). Contractual conditions precluded collecting commission by the agent but the Court intimated that non-disclosure of the name of the purchasing party when it is known that principal would not sell to him would be a breach of duty resulting in a loss of commissions.

[9] Audubon Bldg. Co. v. F. M. Andrews Co., 187 Fed. 254 (C.C.A. 5th 1911).

[10] Kearney v. Taylor, 15 How. 494 (U.S. 1853).

[11] Combs v. Baker, 203 Ark. 602, 158 S.W.(2d) 48 (1942).

[12] Strass v. Chagrin River Hardwood Co., Ohio App. (1947); 77 N.E.(2d) 268 (1947).

[13] 2 Am. Jur. 205.

[14] Jansen v. Williams, 36 Neb. 869, 55 N.W. 279 (1893).

determine non-disclosure of a loan made by the agent to a purchaser to be a breach of duty.[17]

Where the agent breaches his fiduciary duty to the principal by non-disclosure of a material fact relating to the agency, the seller is not limited to a single remedy. Since the agent loses his right to any commission the seller need not pay him if the agency contract is executory,[18] or if the agent has retained the commission from the purchase price, the principal may sue to recover it.[19] Should any damage be sustained by the principal because of this breach of duty by the agent, even where the agent acts in good faith, liability will also result in a tort action by the principal against the agent for damages.[20] Nor are the remedies limited solely to actions against the agent. The sale may be rescinded with the purchaser upon returning what was received. The third party purchaser may be entirely ignorant of any duplicity on the part of the agent yet the seller may avoid the sale.[21]

Although no case could be found with the same fact situation, the present decision can be justified by precedent. What constitutes a material fact in each instance will be a question of fact for the jury. It is submitted that the rule of the Restatement of Agency[22] is the more logical one especially where the seller was aware of the sale price, cognizant of the buyer and uninformed only as to the financing of the purchaser by the auctioneer.

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Bills and Notes — Liability of Drawee of Draft Who Has Orally Promised to Accept — Drawer undertook to pay for cattle by issuing three drafts upon defendant payable to plaintiff. Drawer had previously purchased cattle from plaintiff with similiar drafts which had regularly been honored by defendant. In answer to an inquiry by plaintiff, sometime before the sale in question, defendant informed plaintiff that the drawer was in bad shape, but when the drawer's drafts were no good, he would tell him. Relying upon these representations by defendant, plaintiff took the drafts in question and delivered cattle to

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[15] Jensen v. Snow, 131 Me. 415, 163 Atl. 784 (1933); McPhetridge v. Smith, 101 Cal. App. 122, 281 Pac. 419 (1929).
[16] Richard v. Holmes, 18 How. 143 (U.S. 1855).
[17] Restatement of the Law of Agency, Sec. 391(b) "An agent may properly deal with the other party to a transaction if such dealing is not inconsistent with his duties to the principal. Thus an agent employed to sell may properly loan money to the buyer to complete the purchase or, unless because of business policy or otherwise it is understood that he is not to do so, he may "split commissions" with the buyer."
[18] Kessler v. Bishop, 51 R.I. 202, 153 Atl. 247 (1931).
[19] Holtsinger v. Beverly, 56 Ga. App. 614, 186 S.E. 776 (1936).
[20] Estate of Pratt: Regan v. Pedrick, 221 Wis. 114, 266 N.W. 230 (1936).
[21] Napier v. Adams, 166 Ga. 403, 143 S.E. 566 (1928).
[22] Restatement of the Law of Agency, Sec. 391(b).