

## Real Estate Broker: Entitlement to Commission After Buyer Defaults Purchase Contract

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bargaining table treats the other unfairly. The same thought has been expressed in a similar manner by Robert D. Leiter in the *Labor Law Journal*<sup>13</sup> where he observed:

"The N.L.R.B. has held that if a union is engaged in an activity which is not consistent with the act, it does not meet the test of bargaining in good faith; such bargaining requires reasoned decisions and balanced relations. It noted that good faith at the bargaining table is generally a relative matter and that the lack of good faith in one party may remove the possibility of negotiation and preclude the existence of a situation in which the other parties good faith can be tested."

The majority of course, see no distinction between the facts here involved and those that exist when a strike is in progress. The distinction, however, appears to be this. Since many strikes are valid, economic expediency requires that the parties bargain in an effort to resolve differences. Under the circumstances here involved, economic expediency does not control and since the union has moved itself outside the periphery of good faith bargaining, the employer can take the position that he will not continue to bargain until the union stops its harassing tactics or goes out on a true strike. No valid strike was employed by the union in the *Textile Workers* case.<sup>14</sup> It is submitted, that recognizing the aforementioned difference between harassing tactics and a valid strike, such union conduct should have been enjoined as bad faith collective bargaining.

RICHARD GLEN GREENWOOD

**Real Estate Broker: Entitlement to Commission After Buyer Defaults Purchase Contract**—Defendants gave plaintiff a standard broker's listing on their property for \$15,900. Three days later, plaintiff secured an unconditional offer of \$15,000 from prospective buyers, which the defendant-sellers accepted, agreeing to close the transaction in three months. When the parties met for the closing, buyers were informed of a judgment docketed against one of the defendants in the amount of \$700. Plaintiff's attorney suggested an escrow arrangement to cover this amount. The purchasers refused to close under such circumstances and promptly departed. Plaintiff, unable to induce the parties to close subsequently, demanded its commission from the defendants, who refused. Plaintiff brought action on its listing agreement in the Civil Court of Milwaukee County. From a judgment for the defendant, plaintiff appealed to the Circuit Court. From an order of the Circuit Court

<sup>13</sup> See Leiter, *The Meaning of Collective Bargaining* 6 LAB. L. J. 835 (Dec. 1955).

<sup>14</sup> See note 1 *supra*.

affirming the trial court, plaintiff appealed. *Held*: judgment reversed for plaintiff. When a real estate broker is employed under a standard listing contract, in which payment of the commission is not contingent on completion of the sale, he is entitled to his commission when a valid contract is entered into between the parties. The fact that the purchaser defaults<sup>1</sup> under such an executory sales contract does not affect the broker's right to his commission. *Wauwatosa Realty Co. v. Paar*, 274 Wis. 7, 79 N.W. 2d 125 (1956).

The listing contract, basis of the plaintiff's claim, contained the following clause:

"If a sale or exchange is made or a purchaser procured therefor by you, by the undersigned, or by any other, at the price and upon the terms specified herein, or at any other terms and price accepted by the undersigned, during the life of this contract, or if sold or exchanged within six (6) months after the termination hereof to anyone with whom you negotiated during the life of this contract and whose name you have filed with me in writing prior to the termination of this contract, the undersigned agrees to pay you a commission of five percent (5%) of the sale price."

No question of the sufficiency of the commission contract under Sec. 240.10, Wis. Stats. is presented by the case.

It is well settled that the phrase, "If a sale or exchange is made or a purchaser procured therefor by you," simply means that the broker must produce a buyer ready, willing, and able to purchase upon the terms specified by the owner in the listing contract.<sup>2</sup> The question is, WHEN must such readiness, willingness, and ability of the buyer be present. The lower courts held that the broker had not performed because the buyers proved unwilling to close the deal. They proceeded on the theory that the buyer's readiness, willingness, and ability had to exist until completion of the transaction. They held, in effect, that consummation of the sale is implied in every standard listing contract. They made no mention of the Massachusetts rule adopted in most states and enunciated in 73 A.L.R. 927.<sup>3</sup>

<sup>1</sup> A lien which may be paid out of the purchase money simultaneously with the delivery of the deed does not make an otherwise perfect title unmarketable. *Woodman v. Blue Grass Land Co.*, 125 Wis. 489, 103 N.W. 236 (1905), 104 N.W. 920. Seller's failure to show title free of the judgment lien on the closing date would not, therefore, justify purchaser's declaration of rescission in the principal case. *Droppers v. Hand*, 208 Wis. 681, 242 N.W. 483 (1932).

<sup>2</sup> *Grinde v. Chapman*, 175 Wis. 376, 185 N.W. 288 (1921).

<sup>3</sup> Earlier annotation at 51 A.L.R. 1394. It may be generally stated that when a real estate broker procures a purchaser who is accepted by the owner, and a valid contract is drawn up between them, the commission for finding such purchaser is earned, although the buyer later defaults for no known reason. Louisiana and Rhode Island contra.

The Supreme Court, by rejecting the implied condition of consummation, differentiates between standard listing agreements and those calling for closing of the sale prior to broker's payment. This differentiation is not foreign to Wisconsin law. As early as 1921,<sup>4</sup> the Supreme Court recognized the distinction. Its importance lies in the different performance required of the broker. As stated previously, where consummation is a condition precedent to payment, the procured buyer must be ready, willing, and able up until the time for closing. The broker operating under a standard listing, however, need only procure a buyer who is ready, willing, and able to enter into a valid contract upon the terms specified by the owner in the listing. Once he has succeeded in having the parties contract, the broker under a standard listing has fully performed, because the buyer's readiness, willingness, and ability is no longer open to question.<sup>5</sup>

The decision, although amply supported by precedent, seems a harsh one; and should be applied to broker's commission cases generally only with extreme caution.

It should be noted that the sale contract, negotiated by the plaintiff, was unconditional.<sup>6</sup> The writer is unprepared to state that the principal case would control a conditional contract, especially if the purchaser's default prevented the condition from occurring.

Although a broker, using a standard listing, may be entitled to his commission upon the settling of the contract to sell, such entitlement is subject to the familiar requirements of fidelity, loyalty, and full disclosure.<sup>7</sup> Failure on the part of the broker to reveal facts known to him which would suggest probability of subsequent default by the buyer might well raise such an issue, absent in the principal case.

The two standard form interim land contracts used in typical real estate transactions,<sup>8</sup> specify forfeiture of buyer's down pay-

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<sup>4</sup> *Dean v. Wendenberg*, 175 Wis. 513, 185 N.W. 514 (1921.)

<sup>5</sup> 12 C.J.S. 85. The general rule is that the broker must show buyer ready, willing, and able to take property and this he must prove where the seller refuses to enter into a valid enforceable contract with the buyer. This general rule is subject to the exception that no such proof is required on part of broker where he acts in good faith and the principal accepts his customer and enters into a contract with him; because in such case the question of the customer's readiness, willingness, and ability is no longer open to question.

<sup>6</sup> Interim land contracts, negotiated by brokers, are frequently conditioned on the buyer's ability to secure financing.

<sup>7</sup> *Hustad v. Drives*, 181 Wis. 87, 193 N.W. 984 (1923).

<sup>8</sup> The H. Niedecken Co. executory sale contract forms, presently in use, are numbered 166 and 168. Wisconsin Legal Blank Co. publishes two improved property forms, one of which, number 824, is substantially identical with Niedecken No. 168, and the second number—994 omits the novation clause, and is otherwise equivalent.

ment upon his default. In addition, one form contains a novation which would appear to modify the commission provisions of the listing contract.<sup>9</sup> The listing agreement, on which plaintiff in the principal case based its claim, recites:

"All deposits made shall be retained by you in a trust account. If forfeited by the buyer, said monies shall first pay for cash advancements made by you; one-half the balance, but not in excess of the commission agreed upon, shall belong to you. The balance shall belong to the undersigned."

The significance of this clause was not argued in briefs of counsel, and the Court makes no mention of it in its decision. It is suggested that such clause might reasonably have been construed as limiting the commission, in event of purchaser-default, to one-half of the forfeited earnest money. If so construed, the limitation would be far more liberal toward the seller than is the standard novation clause, cited at note 9, *supra*. Certainly it would be unreasonable to construe the clause so as to give broker one-half of the forfeited deposit in addition to his full commission. The absence of any express limitation in the plaintiff's listing contract would not authorize such unreasonable construction, especially in view of the rule that doubtful provisions of contracts are construed most strictly against the party who drew the contract.<sup>10</sup>

It is unfortunate that the matter of the buyer's \$1000 down payment was not put in issue.<sup>11</sup> Future actions, however, based on similar facts will undoubtedly involve the application of forfeitures to any commissions claimed. Inasmuch as such application may still result in the seller's personal liability for a balance of the commission, it is suggested that Sec. 240.10, Wis. Stats., be amended so as to limit the broker's commission in buyer default cases to the amount of the forfeited down payment, or the amount provided in the commission agreement, whichever is smaller.

ROBERT CHOINSKI

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**Class Gifts: Time When Class Closes—Rule of Convenience—** Testator left a will bequeathing to his grandchildren the sum of fifty thousand dollars in trust. The income from the principal was

<sup>9</sup> Offer to Purchase form No. 168 *ibid.*, incorporates the following clause in the seller's acceptance: "For and in consideration of the services furnished, the undersigned agrees to pay to \_\_\_\_\_ as commission, the sum of \$ \_\_\_\_\_, and in the event the deposit made by the buyer shall be forfeit, such deposit shall first apply to your commission; the balance, if any, shall belong to the undersigned. In such event, the commission shall not exceed the deposit."

<sup>10</sup> *Deree v. Reliable Tool & Machine, Inc.*, 250 Wis. 224, 26 N.W. 2d 673 (1947).

<sup>11</sup> A reading of the cases and briefs disclosed both the amount of the down payment and the fact that it was returned to the buyers. The sellers presently have an action pending against the plaintiff for recovery of the down payment.