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Agency - Right of Real Estate Broker to a Commission from Seller - Ellsworth Dobbs, Inc. v. Johnson, 236 A.2d 843 (N.J. 1967)

Terry B. Light

arbitrary classification which is under-inclusive[13] if, as is generally the case, these benefits could be commuted to a lump sum payment. Similarly, this argument would extend to statutes which include only certain disabilities under workmen's compensation as "disqualifying income." Indeed, it could be held in conjunction with *Fox*, that this further refinement of the class, based on a type of disability, is not reasonably related to the purpose of the duplicity-of-payment statutes.[14]

The holding of Fox does not answer the question of whether or not benefits under workmen's compensation should be awarded concurrently with benefits under unemployment insurance. Its significance lies in its recognition of the fact that statutes denying such duplicity may be held to create an unreasonable classification. As long as workmen's compensation statutes allow lump sum payments, but consider the benefits derived thereunder to be "disqualifying income" only when received during the week in which unemployment insurance is sought, this unreasonable classification will necessarily exist.

MICHAEL COLLINS

Agency—RIGHT OF REAL ESTATE BROKER TO COMMISSION FROM SELLER. In *Ellsworth Dobbs, Inc. v. Johnson*,[1] plaintiff, a real estate broker, sought to recover from his client, the seller,[2] a brokerage com-

13. *See* Tussman & tenBroek, *The Equal Protection of the Laws*, *supra* note 5, at 348-53.

14. The court pointed out that:

> "[T]he classifications made in section 27(n) of the Employment Security Act between those partially and permanently disabled and those under the specific loss provisions of The Workmen's Compensation Act fail to treat all within the class equally, as section 27(n) allows benefits under both The Employment Security Act and The Workmen's Compensation Act for one suffering a specific loss and yet denies the same to one permanently and partially disabled." 379 Mich. 579 at —, 153 N.W.2d 644, 649 (1967).

1. 50 N.J. 528, 236 A.2d 843 (1967).

2. The seller impleaded the buyer, and the judgment in the trial court was against both. The jury found for plaintiff against the buyer on the basis of a breach of an implied promise on the part of the buyer to complete the purchase and thereby enable the broker to earn his commission. Ruling on this aspect of the case, the court held that where the buyer had solicited the help of the broker in finding land, and knew that the broker expected to get his commission from the seller on completion of the sale, the buyer was liable to the broker for the commission he would have earned. *See* Eells Bros. v. Parsons, 132 Iowa 543, 109 N.W. 1098 (1906); Tanner v. Ciraldo, 33 N.J. 51, 161 A.2d 725 (1960).

mission allegedly due him under a contract of sale[3] which had ultimately failed because of the inability of the buyer to pay the purchase price at the time for closing title. The trial court held for the plaintiff, but the appellate court reversed, holding that the liability of the seller to the broker was a question of fact for the jury.[4] The Supreme Court of New Jersey granted certification in order to consider the fairness of continuing a rule under which a seller is held liable to his broker for a commission as of the time he enters into a contract with a potential buyer, whether or not the buyer ever actually completes the transaction.[5]

Basing its decision on public policy,[6] the court held as a matter of law that where title does not pass solely because of the unjustified refusal or financial inability of the buyer, the broker is not entitled to recover his commission from the seller.[7]

In thus holding, the court limited the application of the rule of *Hinds*

3. The contract provided that the actual payment of the commission would be made in installments as the purchase price was paid. The commission was payable "in consideration of services rendered in consummating this sale." 50 N.J. at 528, 236 A.2d at 843. Under the general rule applicable, the seller could be held liable for the commission regardless of whether or not the sale was consummated. Freeman v. Van Wagen, 90 N.J.L. 358, 101 A. 55 (1917); Winter v. Toldt, 32 N.J. Super. 443, 108 A.2d 648 (1954); *See* Lippincott v. Content, 123 N.J.L. 277, 8 A.2d 362 (1939) (where similar language was interpreted to mean that closing of title was a condition precedent to the broker having a right to his commission). The question in these cases would ordinarily seem to be whether the words impose a condition precedent or merely fix the date on which payment is to be made. In Dobbs, the court disregarded language of the contract which stated the terms of payment of the commission.

4. Ellsworth Dobbs, Inc. v. Johnson, 92 N.J. Super. 271, 223 A.2d 199 (1966).

5. Ellsworth Dobbs, Inc. v. Johnson, *cert. granted* 48 N.J. 354, 225 A.2d 365 (1966), *aff'd on other grounds*, 50 N.J. 528, 236 A.2d 843 (1967).

6. The court's holding in the principal case was no doubt greatly influenced by its past expansion of the area of public policy into other commercial fields. Its language in Henningsen v. Bloomfield Motors, 32 N.J. 358, 161 A.2d 69 (1960), is of telling impact:

> [T]he gross inequality of bargaining position occupied by the consumer in the automobile industry is thus apparent. There is no competition among car makers in the area of express warranty. Where can the buyer go to negotiate better protection? Such control and limitation of his remedies are inimical to the public welfare and, at the very least, call for great care by the courts to avoid injustice through application of strict common law principles of freedom of contract. *Id.* at 87.

See Kuzmiak v. Brookchester, Inc., 33 N.J. Super. 575, 111 A.2d 425 (1955); Reinhardt v. Passaic-Clifton National Bank, 16 N.J. Super. 430, 84 A.2d 741 (1951); Hodnick v. Fidelity Trust Co., 96 Ind. App. 342, 183 N.E. 488 (1932).

7. 50 N.J. 528, 236 A.2d 843.

v. Henry,[8] the clearly prevailing American view.[9] This majority rule had grown out of the strict application of fundamental principles of contract and agency in litigation involving the seller-broker relation.[10] Following those principles, courts have held that a real estate broker is entitled to his commission when he has produced a buyer who is ready, willing, and able to buy on terms set by the seller; and therefore the seller cannot, by any unjustified act of his own, defeat the broker's right to a commission.[11] In this respect, the courts have alternately taken the position that the buyer must either be ready, willing, and able at the time he is introduced to the seller,[12] or at the time he and the seller enter into a valid, enforceable contract of sale.[13]

Where such a contract exists, it is held that, by the act of entering into the contract, the seller impliedly makes his own independent determination of the willingness and financial ability of the buyer to com-

8. 36 N.J.L. 328 (1873). In this case, the court had held that:

> The right of the broker to commission is complete, when he has procured a purchaser able and willing to conclude a bargain on the terms on which the broker was authorized to sell. When such a purchaser is produced, the principal cannot defeat the agent's right to compensation by a refusal, without sufficient reason, to fulfill the agreement which the agent had power to make. *Id.* at 332.

That this language could be used as the basis of a rule which would allow the broker to recover even in a case where the seller is without fault and powerless to enforce the contract, indicates that courts, in applying the rule, have been preoccupied with protecting the broker. In New Jersey, this rule has received what may be extreme extension in Blau v. Friedman, 26 N.J. 397, 140 A.2d 193 (1958) and Freeman v. Van Wagen, 90 N.J.L 358, 101 A. 55 (1917).

9. *See* McGavock v. Woodlief, 61 U.S. (20 How.) 221 (1858); O'Glee v. Trigg, 271 F.Supp. 121 (E.D. Ark., 1967); E. A. Strout Western Realty Agency v. Lewis, 62 Cal. Rptr. 918 (Cal. Ct. App. 5th Dist., 1967); Spratlin, Harrington & Thomas, Inc. v. Hawn, 116 Ga. App. 175, 156 S.E.2d 402 (1967); C. O. Frick v. Baetzel, 71 Ohio App. 301, 47 N.E.2d 1019 (1942); 10 WILLISTON ON CONTRACTS, sec. 1287 (3rd ed. 1967); RESTATEMENT (SECOND) OF AGENCY, sec. 445 (d)(1), 448 (1957); 1 MECHEM, A TREATISE ON THE LAW OF AGENCY, sec. 966 (4th ed. 1889).

10. The foundation of the rationale of the general rule is the concept of the broker as a middleman whose only duty is to bring the parties together. *Id.*, sec. 966 at 793, 797.

11. *See* Dotson v. Milliken, 209 U.S. 237 (1908); Bechtel Properties, Inc. v. Blanken, 299 F.2d 1928 (C.A. D.C.) *aff'g* 194 F. Supp. 638 (D. D.C., 1961); Hinds v. Henry, 36 N.J.L. 328 (1873).

12. *See* Freeman v. Van Wagen, 90 N.J.L. 358, 101 A. 55 (1917); Alnor Const. Co. v. Herchet, 10 N.J. 246, 90 A.2d 14 (1952); Libowitz v. Lake Nursing Home, Inc., 35 Wis.2d 74, 150 N.W.2d 439 (1967).

13. *See* Hedden v. Folio, 62 N.J. Super. 470, 163 A.2d 163 (1960); C.O. Frick Co. v. Baetzel, 71 Ohio App. 301, 47 N.E.2d 1019 (1942).

plete the sale,[14] thus discharging the broker from further responsibility.[15] Such a theory therefore places the burden of determining the willingness and ability of the buyer, as well as the risk of his nonperformance, squarely upon the seller.

The ultimate effect of *Ellsworth Dobbs, Inc. v. Johnson*[16] is to shift this burden and risk from the seller to the broker. The court expressly rejected, as neither fair nor reasonable, the proposition that the seller, merely by entering into a contract, impliedly uses his own independent judgment to determine the buyer's willingness and ability to perform. Instead, the court felt that the "real relationship" between seller and broker is that of a seller who is relatively ignorant of the commercial and legal implications of the modern land transaction, as opposed to the broker who is ordinarily trained, licensed, and experienced. The application of the rule of *Hinds v. Henry*[17] is thus limited to those cases where the seller himself is not without fault.

The decision in *Dobbs* not only places a restriction on a rule which had been extended beyond its just limits,[18] but in addition represents a

14. *See* Bechtel Properties, Inc. v. Klanken, 299 F.2d 928 (C.A. D.C.), *aff'g*, 194 F. Supp. 638 (D. D.C., 1961).

15. *See* Martino v. Palladino, 143 Conn. 547, 123 A.2d 872 (1956); De Harpport v. Green, 215 Ore. 281, 333 P.2d 900, (1959); MECHEM, *supra* note 9.

16. 50 N.J. 528, 236 A.2d 843.

17. 36 N.J.L. 328. In such cases the rule of Hinds v. Henry may still be followed. Thus, where a purchaser procured by a broker enters into a valid, enforceable contract with the seller and subsequently proves unwilling or unable to consummate the sale, the rule of Ellsworth Dobbs, Inc. v. Johnson would apply, but where such a contract is made, and the buyer remains at all times willing and able to perform, but the seller without justification refuses to complete the sale, the court could apply Hinds v. Henry with a just result.

Inasmuch as a legally unjustified refusal or inability to pay on the part of the buyer will be, under Dobbs, a complete defense to an action by the broker against the seller, New Jersey brokers will be pressed to seek greater protection from provisions in brokerage agreements. But the court's pronouncement against standard form contracts and provisions which reflect grossly unequal bargaining capacities will most likely inhibit such efforts. 50 N.J. 528, 236 A.2d 843.

18. *See* Sweet v. H.R. Howenstein, 60 D.C. App. 20 (D.C. Cir. 1934); Mitidiere v. Saito, 246 Cal.2d 535, 54 Cal. Rptr. 665 (1966); Rividell v. Rago, 215 Cal.2d 614, 30 Cal. Rptr. 622 (1963); Goldgar v. North Fulton Realty Co., 106 Ga. App. 459, 127 S.E. 2d 189 (1962); Shaw v. Chiles, 9 Ga. App. 450, 71 S.E. 747 (1911); Murphy v. Brown, 252 Iowa 764, 108 N.W.2d 353 (1961); Treigle v. Patrick, 138 So.2d 652 (La. App., 1962); Riggs v. Turnbill, 105 Md. 135, 66 A. 13 (1907); Keener v. Harrod, 2 Md. 63, 56 Am. Dec. 706 (1852); Cunningham v. Garber, 361 Mich. 90, 104 N.W.2d 746 (1960); Gartner v. Higgins, 214 A.2d 849 (R.I., 1965); Butler v. Barker, 17 R.I. 582, 23 A. 1019 (1892). The new state of Hawaii appears to have followed the rule in the principal case. Ikeoka v. Kong, 47 Hawaii 220, 386 P.2d 855 (1963).

break in the traditional preoccupation of the courts with the protection of the broker, and is a further step in a growing trend toward protection of the consumer in his dealings with commercial specialists whose services are required but not understood.

TERRY B. LIGHT

Constitutional Law—FREE SPEECH—PUBLIC TRANSIT ADVERTISING. In *Wirta v. Alameda–Contra Costa Transit Dist.*,[1] an association known as "Women for Peace" sought to buy bus advertising space to place a message advocating a negotiated settlement to the Vietnam War.[2] Defendant transit company refused the request, stating that their policy was to allow only commercial advertisements for the sale of goods and services, except during elections.[3] An action was brought by the association alleging that defendants' refusal had deprived them of their rights of free speech and equal protection under the First[4] and Fourteenth[5] Amendments to the Constitution.

The Court of Appeals rejected the association's allegations, finding that the defendants' advertising policy was neither arbitrary nor discriminatory but rather in the public interest.[6] The California Supreme Court, in reversing the lower court's decision, held that by allowing commercial advertising, the transit district had opened their facilities as a "forum for the expression of ideas," and therefore they could not

1. 64 Cal. Rptr. 430, 434 P.2d 982 (1967).

2. The text of the proposed advertisement was:

"Mankind must put an end to war or war will put an end to mankind."
President John F. Kennedy.

Write to President Johnson: Negotiate Vietnam.
Women for Peace
P.O. Box 944, Berkeley.

Id., at 432, 434 P.2d at 984.

3. *Id.* Defendants were a public transit district and a private corporation. The corporation leased advertising space from the district and re-leased it to advertisers under an agreement where advertisements on controversial subjects were not acceptable unless approved by the district.

4. U.S. CONST. amend. I: "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

5. U.S. CONST. amend. XIV: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States: . . . nor deny to any person within its jurisdiction the equal protection of the laws."

6. Wirta v. Alameda-Contra Costa Transit Dist., 61 Cal. Rptr. 419 (Ct. App. 1967).