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Contracts - Agency - Right to Commission Hummer v. Engeman, 206 Va 102 (1965)

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decided, however. It still may be possible that a contractor, suing on a contract where the defendant could prove wilful departure, might be barred from any recovery in the absence of a cross bill, at least under state procedure; but the tide appears to be running against such results. Balancing the damages sustained by each party is the concept now dominating the courts' considerations, and the instant case is a good example of the trend.

William C. Cowardin, Jr.

Contracts-Agency—RIGHT TO COMMISSION: The respondent, George H. Engeman, a real estate broker, entered into a "Sales Agreement" with Grace and Aubrey Hummer on August 21, 1959 whereby Engeman was granted an exclusive right to sell the Hummers' farm. The agency was to be effective for a thirty-day period and then become terminable at will upon ten days' prior notice in writing. In accordance with the agreement, the broker initiated his efforts to sell the farm by contacting his "best clients," showing the property to prospective buyers, and advertising its availability by "word of mouth." On August 29, he submitted a signed contract which he had obtained from one Noyes, but Hummer rejected the agreement, on the advice of his attorney, since the terms of the proposed sale had been altered.

Shortly thereafter Hummer sent Engeman notice that the agency had been revoked and subsequently sold the farm himself, whereupon the broker brought an action for his commission. In an amended pleading, Engeman alleged that the listing agreement was valid and that the exclusive agreement had made such irrevocable until expiration of the thirty-day period stated therein. In substance, he contended that Hummer had become liable for the sum requested, by invoking his *power* to terminate the agency when he had relinquished his *right* to exercise it under the "Sales Agreement" listing his farm.¹

The trial judge, upon hearing the arguments of counsel, stated that no issue of fact had been presented for determination by the jury and entered judgment for the plaintiff, as a matter of law, in the amount of the commission. Following the court's denial of a motion to have a jury impaneled to assess damages, the defendants appealed from the order to the Supreme Court of Appeals of Virginia.²

1. Piper v. Wells, 175 Md. 326, 2 A.2d 28 (1938).

2. Hummer v. Engeman, 206 Va. 102, 141 S.E.2d 716 (1965).

Reviewing the decision entered below, the court ruled that the trial court erred as to Hummer's right to revoke the agency and that having done so he was not liable upon the listing. The holding expressed the Virginia Supreme Court of Appeals' view that such a listing agreement was without consideration and consequently terminable at will regardless of the tenure specified. "Nowhere in the agreement did plaintiff promise to perform or not perform."³ Thus, the listing agreement was construed as a unilateral contract, the acceptance of which is only executed by performance of the act, namely the procurement of a purchaser by the broker.⁴

It was found that Engeman's negotiations with the prospective buyer, Noyes, were immaterial since by altering the terms of the proposed sale he failed to complete his undertaking as instructed so as to constitute performance.⁵ Adhering to the principle of strict construction of unilateral contracts and relying on the contractual doctrine of consideration, the court reasoned that such "Sales Agreements" lack mutuality of obligation and are therefore unenforceable.⁶ By applying this approach, the appellate court adopted the view that mere performance of the acts of a broker is contemplated to do for his own benefit so as to interest potential buyers is insufficient to make the agency irrevocable.⁷

However, other courts have either modified this stand under similar factual situations or wholly rejected it, treating "the exclusive agreement as if it were a catalyst, capable of changing a contract, unilateral in form into a bilateral one."⁸ The Virginia Supreme Court of Appeals, in two previous decisions, had held that listing agreements were bilateral, *Morris v. Bragg*⁹ and *Wilson v. Brown*,¹⁰ but they are distinguished on the basis of their recitals of the consideration. Both contracts provided

3. *Hummer v. Engeman*, *supra* note 2, at 719.

4. *Bartlett v. Keith*, 325 Mass. 265, 90 N.E.2d 308 (1950); *Stensgaard v. Smith*, 43 Minn. 11, 44 N.W. 669 (1890).

5. *MECHEM*, AGENCY § 965 (1889).

6. For discussion see 12 AM. JUR. 2d *Brokers* § 32 (1964).

7. *Cronin v. American Securities Co.*, 163 Ala. 533, 50 So. 915 (1909); *Des Rivieres v. Sullivan*, 247 Mass. 433, 142 N.E. 111 (1924); *Baird v. Lewis*, 229 Miss. 61, 90 So. 2d 184 (1956); *Flinders v. Hunter*, 60 Vt. 314, 208 Pac. 526 (1922).

8. *Baumgarten v. Meek*, 126 Cal. App. 2d 505 (1954); *Braniff v. Blair*, 101 Kan. 117, 165 Pac. 816 (1917); *Chamberlain v. Grisham*, 360 Mo. 655, 230 S.W.2d 721 (1950): See also 30 *FORDHAM L. REV.* 147.

9. 155 Va. 912, 156 S.E. 381 (1931): The contract here stated that the agency was given "in consideration of your efforts to find a purchaser".

10. 136 Va. 634, 118 S.E. 88 (1923): The contract here stated that the agency was given "for the consideration of advertising and making reasonable efforts to sell".

that the efforts of the real estate agent should support the promises of the owner.

A contrary result was reached by the Georgia Court of Appeals which implied the presence of statements to this effect and held that where a broker expends time and effort endeavoring to effect a sale pursuant to his employment by the owner, the listing ripens into a bilateral contract by the agent's expenditure of his physical and fiscal exertion to find a buyer.¹¹ The mere attendance of a recital of some fixed time limitation has produced holdings that such agreements are irrevocable during that period.¹²

The characterization of listing agreements as bilateral contracts has been based upon numerous theories.¹³ The most significant of these being:

- (1) because the broker has incurred a detriment¹⁴;
- (2) estoppel¹⁵;
- (3) because the owner has agreed to a restriction of his right of revocation¹⁶;
- (4) the beginning of performance forms the contract¹⁷; and
- (5) conditional rights and duties are created by part performance.¹⁸

Often the particular basis for a decision cannot be determined since the views obviously overlap. The departure from the theoretical mandates of the doctrine of consideration is not ignored but such inconsistency is justified by declaring that they are "outweighed by considerations of practical justice."¹⁹

A course between the approaches related by the preceding might

11. *Thornton v. Lewis*, 106 Ga. 328, 126 S.E.2d 869 (1962).

12. *Jones v. Hollander*, 3 N.J. Misc. 973, 130 Atl. 451 (1925); *Pickett v. Bishop*, 148 Tex. 207, 223 S.W.2d 222 (1949); *Wright v. Vernon*, 81 Cal. App. 2d 346, 183 P.2d 908 (1947).

13. For discussion and authorities cited therein see Wallace, *Promissory Liability Under Real Estate Brokerage Contracts*, 38 IOWA L. REV. 350 (1952).

14. *Thompson v. Hudson*, 76 Ga. App. 807, 47 S.E.2d 112 (1948); *Piper v. Wells*, 175 Md. 326, 2 A.2d 28 (1938).

15. *Oregon Home Builders v. Crowley*, 87 Ore. 517, 170 Pac. 718 (1918).

16. *Rowan Co. v. Hull*, 55 W.Va. 335, 47 S.E. 92 (1904); *Cloe v. Rogers*, 31 Okla. 255, 121 Pac. 201 (1912).

17. *John E. DeWolf Co. v. Harvey*, 161 Wis. 535, 154 N.W. 988 (1915); *Braniff v. Baier*, 101 Kan. 117, 165 Pac. 816 (1917).

18. *Baker v. Howison*, 213 Ala. 41, 104 So. 239 (1925); *Kimmell v. Skelly*, 130 Cal. 555, 62 Pac. 1067 (1900).

19. *Hutchinson v. Dobson-Bainbridge Realty Co.*, 31 Tenn. App. 494, 217 S.W.2d 10 (1946): See also, *Hughes v. Bickley*, 205 Ala. 619, 89 So.33 (1921).

quite possibly prove to satisfy this end while preserving the reliability of strict contract law. The Illinois Court of Appeals in *Pretzel v. Anderson*²⁰ achieved such by stating that the owner had both the right and the power to terminate the agency without liability, but if the broker proved a certain sum of money or energy expended in the attempt to sell prior to the revocation he might recover on the basis of *quantum meruit*. Thereby the principles of law were not sacrificed and a remedy was given in equity where one was necessary but none was provided by law.

The decision in *Hummer v. Engeman*, as recited by the Supreme Court of Appeals of Virginia, does not preclude a *quantum meruit* recovery per se but makes no mention of its availability to the broker. The failure of the respondent to raise this issue may well explain the omission of this point in the court's opinion, yet a statement in this regard, even in the form of dicta, would have done much to clarify and define the nature of listing agreements. "It is for the law to recognize an obligation as arising from a promise as soon as justice requires."²¹ By leaving the obvious question unanswered, *Hummer v. Engeman* falls short.

Robert P. Wolf

Contracts—THE PAROL EVIDENCE RULE—EXCEPTIONS; THE PARTIAL INTEGRATION AND COLLATERAL CONTRACTS DOCTRINES. Plaintiff, George L. Durham, brought an action for damages for breach of an alleged oral indemnification contract against the National Pool Equipment Company of Virginia, defendant. This alleged contract concerned the maximum cost of a swimming pool constructed for the plaintiff's motel by the defendant. The defendant denied the allegation concerning the oral contract. The defendant, in turn, contended that the entire agreement between the parties was embodied in two written contracts. The trial court struck the plaintiff's evidence concerning the oral contract upon the defendant's motion. The lower court said the oral agreement was "completely inconsistent" with the written contracts and inadmissible because of the parol evidence rule. The plaintiff excepted to the striking of this evidence. The Supreme Court of Appeals of Virginia upheld the plaintiff's contention that the parol evidence rule did not apply

20. 162 Ill. App. 538 (1911).

21. Ballantine, *Acceptance of Offers For Unilateral Contracts by Partial Performance of Service Requested*, 5 MINN. L. REV. 94 (1921).