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Contracts--Brokers' Commissions--Conditions Precedent as Distinguished from Time of Payment (Amies v. Wesnofske, 255 N.Y. 156 (1931))

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tence by amendment alters the terms of the judgment itself and is a judicial act as much as the imposition of the sentence in the first instance."⁸

J. C.

CONTRACTS—BROKERS' COMMISSIONS—CONDITIONS PRECEDENT AS DISTINGUISHED FROM TIME OF PAYMENT.—Plaintiffs, real estate brokers, employed by the defendants to bring about a sale of their property, brought a party to the defendant whom the latter accepted as one ready, willing, and able to purchase the property. At the time the contract was entered into between defendant and buyer, the former executed and delivered to plaintiff a writing recognizing the plaintiffs as the brokers who brought about the sale and agreed to pay a stated sum, "one-half of which is to be paid this date and the balance to be paid on the closing of title." Title was never closed. The defendants agreed to relieve the purchaser from the contract and kept a \$10,000 deposit. Plaintiff sued for the unpaid half of his commission. The plaintiff's contention was that the contract merely fixed the time for payment of the commission and was not a condition precedent. They also claimed that the voluntary releasing of the buyers by the defendant did not preclude the broker from collecting commission as the contract might have been enforced. The jury found at the trial that the written agreement was the same as the contract the parties originally entered into at the time of employment. *Held*, for defendant. Plaintiff was not entitled to the commission; the agreement was a condition precedent which never came about. Defendants were not at fault, nor obliged to enforce the contract to sell. By retaining the down payment as a forfeiture, they did not thereby waive the condition upon which liability for payment of commission depended. *Amies v. Wesnofske*, 255 N. Y. 156, 174 N. E. 436 (1931).

Ordinarily a real estate broker has earned his commission and is entitled to it when he has brought to his client one who is ready, willing, and able to purchase the property at the terms stated by the seller or when a new offer is made by the buyer and accepted by the seller.¹ The broker and client may vary this rule at the time of employment by providing that the commission shall be paid upon the happening of some contingent event.² The contingency is then a condition precedent and no recovery can be had if it is

⁸ *Ibid.*

¹ *Davidson v. Stocky*, 202 N. Y. 423, 95 N. E. 753 (1911); *B. W. Loughheed Co. v. Yone Suzuki*, 216 App. Div. 487, 215 N. Y. Supp. 505 (1st Dept. 1926), *aff'd* 243 N. Y. 648, 154 N. E. 642 (1926); 2 *Williston, Contracts* (1920), 1030; 2 *Gerard, New York Real Property* (6th ed. 1926) 1080; *Robinson's New York Real Estate Law* (1930) 277.

² *Colvin v. Post Mortgage and Land Co.*, 225 N. Y. 510, 122 N. E. 454 (1919); *Reichard v. Wallach*, 91 N. Y. Supp. 347 (1904); *B. W. Loughheed & Co. v. Yone Suzuki*, *supra* note 1; 2 *Williston, supra* note 1, 1030; *Robinson, supra* note 1, 277; *Tiffany, Agency* (2nd ed. 1924), 150.

not fulfilled.³ In such case there cannot even be a recovery for the *quantum meruit* of the broker's services.⁴ From a commercial aspect it is not difficult to conceive that many brokers are making such contracts in an effort to stimulate their business.⁵ Even under such an agreement if the broker's work is done and the condition fails to take place because of some active fault on the part of the seller, the broker will be compensated.⁶ Such being the rule of law, and the jury in the instant case having found as a fact that the parties entered into such a contract, it does not seem error for the Court to hold as a matter of law where such an ambiguity presents itself in the wording of the agreement, that the intention was to set a condition precedent and not merely state the time for payment. If the latter were true it would be a simple matter to make such intention explicit by the language used.⁷ It seems to be the custom in the selling of real estate to keep deposits such as were made in the case at hand, if the sale is not consummated. Such deposits in varying amounts in different cases can hardly be called liquidated damages. Even if they could be called liquidated damages the broker would not be entitled to his commission in this case because the actual condition on which payment was based, the "closing of title," never came about.⁸ This case should be distinguished from cases where similar agreements are entered into after the broker's work is done. In that case the new agreement is without consideration, is *nudum pactum* and unenforceable.⁹ These agreements, if made after the time of employment of the broker, to be valid, must be made before the broker's work is finished and the contract of sale is consummated.¹⁰ This decision, involving as many circumstances as it does, justly holds the broker to the contractual obligations that he has set for himself in the bargain with his principal.

E. H. S.

³ *Ibid.*

⁴ Tiffany, *supra* note 2.

⁵ Colvin v. Post Mortgage and Land Co., *supra* note 2 at 517, 122 N. E. at 456, "No collections, no commissions has a fair business appeal to both seller and broker." This case is cited and the above quotation used by the Court in B. W. Loughheed & Co. v. Yone Suzuki, *supra* note 1.

⁶ Colvin v. Post Mortgage and Land Co., *supra* note 2 (*Held* also that the question of whether the defendant was at fault in breaking the contract was one of fact for the jury); B. W. Loughheed & Co. v. Yone Suzuki, *supra* note 1.

⁷ B. W. Loughheed & Co. v. Yone Suzuki, *supra* note 1.

⁸ Watson v. Muskegon S. S. Corp., 208 App. Div. 158, 203 N. Y. Supp. 194 (1st Dept. 1924).

⁹ Reis v. Zimmerli, 224 N. Y. 351, 120 N. E. 692 (1918).

¹⁰ Verity v. Ottinger, 223 App. Div. 344, 227 N. Y. Supp. 650 (1st Dept. 1928).