

BURLINGTON COUNTY CIRCUIT COURT

WILLIAM G. LECONEY,
Plaintiff, }
vs. } ACTION AT LAW
CHRISTOPHER KOCH,
Defendant. }

Mount Holly, N. J., November 17, 1924

TESTIMONY

Before HON. FRANK B. JESS, Judge and a Jury

APPEARANCES

For Plaintiff, MESSRS. PALMER & POWELL
For Defendant, JAMES MERCER DAVIS, ESQ.

New Jersey State Library

BURLINGTON COUNTY CIRCUIT COURT

William G. Leconey, Plaintiff
vs.
Christopher Koch, Defendant.

10 Action at Law

CAPIAS AD RESPONDENDUM
COMPLAINT

20 PALMER & POWELL,
117 Main Street, Mount Holly, N. J.
Attorneys for Plaintiff.

Let the defendant be held in bail in the sum of \$825.00.
William A. Slaughter,
Supreme Court Commissioner.

30

Served March 30, 1924—Defendant arrested and gave bail.

NEW JERSEY, SS: THE STATE OF NEW JERSEY to the Sheriff of the County of Burlington, Greeting: We command you that you take Christopher Koch, if in your county he may be found and him safely keep

(Seal)

so that you may have his body before the Burlington County Circuit Court to be held at Mount Holly in and for the said County on the 7th day of April, 1924, to answer unto William G. Leconey in an action at law wherein the said plaintiff demands \$825.00; and have you then and there this writ. 10

WITNESS, Theodore B. Schimpf, Judge of the Burlington County Circuit Court at Mount Holly, this 29th day of March, nineteen hundred and twenty-four.

William H. Reeves, Clerk.

Palmer & Powell, Attorneys.

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30

BURLINGTON COUNTY CIRCUIT COURT

WILLIAM G. LECONEY,
Plaintiff, }
 vs. } ACTION AT LAW
 CHRISTOPHER KOCH, } COMPLAINT
Defendant. }

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Plaintiff, who resides at Moorestown, in the County of Burlington and State of New Jersey, says that:

1. On July 6th, 1923, defendant, Christopher Koch, entered into an agreement with plaintiff wherein and whereby defendant placed with plaintiff for sale a certain property known as No. 435 Camden Avenue, Moorestown, New Jersey, for the sum of \$35,000.00 and thereby agreed to pay plaintiff a three per cent. (3%) commission upon the gross sale price of said property if the same was sold by plaintiff or by defendant or by anyone else.
2. On March 19th, 1924, defendant sold said property to one, Louis T. Klauder for the sum of \$27,500.00 the deed for which property was recorded on the 21st day of March, 1919, in the Burlington County Clerk's office.
3. That upon said sale plaintiff became entitled to his commission of three per cent. of the said \$27,500.00, amounting to the sum of \$825.00.

Plaintiff demands damages in the sum of \$825.00 together with interest thereon from March 19th, 1924, and costs of suit.

Palmer & Powell,
Attorneys for Plaintiff.

BURLINGTON COUNTY CIRCUIT COURT

WILLIAM G. LECONEY,
Plaintiff, }
 vs. } ACTION AT LAW
 CHRISTOPHER KOCH, } ANSWER
Defendant. }

10

The defendant, answering, says:

1. He denies the matters and things set up in Paragraph 1.
2. He admits that said property was sold to Louis T. Klauder as set forth in Paragraph 2.
3. He denies Paragraph 3.
4. He denies that the defendant is entitled to any sum whatsoever.

DEFENSES

1. The defendant will urge at the trial that the complaint herein does not set forth a cause of action.
2. The plaintiff herein did not use any endeavor toward the sale of the property referred to in the complaint, but, on the other hand, discouraged the sale of the said property.
3. The said plaintiff did not use good faith toward the defendant in the alleged undertaking.

James Mercer Davis,
Attorney of Defendant.

MR. DAVIS: I submit, if your Honor please, it cannot be proved in that way.

THE COURT: Well, why not?

MR. DAVIS: It must be proved by witnesses other than those that are parties to the contract.

10 THE COURT: I don't know of any such rule. There may be. There appears to be no witness to that contract.

MR. DAVIS: There were none that is on there but there may nevertheless have been a witness.

Q. Did you see Mr. Koch sign that contract? A. I did.

MR. DAVIS: May I find out what your Honor's ruling is?
20

THE COURT: What is the objection, Mr. Davis? I will rule on it.

MR. DAVIS: I have stated my objection. My objection is that it cannot be proved in this manner, that it must be proved by a witness.

THE COURT: Do you object to the specific question?

30 MR. DAVIS: Yes.

THE COURT: Then I overrule the objection.

(Objection noted for defendant as ground of appeal.)

Q. Was that contract signed in your presence, Mr. Leconey? A. Yes, sir.

Q. You saw him sign it? A. Yes, sir.

MR. PALMER: I offer the contract.

MR. DAVIS: Objected to for the reasons I have stated.

THE COURT: Objection overruled. It may be marked. 10

(Objection noted for defendant as ground of appeal.)

(Paper marked Exhibit P I.)

MR. PALMER: This contract, ladies and gentlemen, reads as follows:

"I, the undersigned, hereby authorize William G. Leconey as sole and exclusive agent to sell the property described on the reverse hereof, which is made part of 20 this agreement, and agrees to pay said agent three per cent. of the gross consideration when the sale or exchange is effected, either by the agent or the owner, before the revocation of this agreement. The owner may revoke this agreement at any time after one month by giving thirty days' written notice, provided no negotiations are pending at the time for sale or exchange of the property. If the property is sold or exchanged subsequently to any party with whom said agent has been negotiating the said commission is to be paid to the said agent. No verbal notice of the termination of this agreement will be 30 recognized.

Witness my hand and seal this 6th day of July, 1923.

(Signed) Chris Koch,

435 Camden Avenue."

This card gives the location of the property and the description of it:

"Premises No. 435 Camden Avenue, 3 story building with slate roof; five rooms on the first floor, five on the second and two on the third." Then come "three bath rooms, closet, laundry, basement, cellar, water, garage", and under the word "Signed," "yes." "Price \$35,000. Terms, \$25,000 for ground with house alone."

10

NO CROSS EXAMINATION

MR. PALMER: If the court please, I would like the clerk to produce some deeds.

(Deeds produced as called for.)

20 I would like to offer in evidence the record of a deed made by Joseph H. Gaskill and wife to Florence F. E. Koch, dated June 1, 1920, and recorded in Book 571 of Deeds, page 245, for certain property on the north side of Camden Avenue, Moorestown, N. J.

MR. DAVIS: That is objected to as not being between the parties to this contract.

THE COURT: What is the purpose of the offer?

30

MR. PALMER: The purpose of the offer is to show the title to this property in Florence F. E. Koch. The defendant represented himself as being the owner. This was the evidence and the only evidence that there was

of this title to either Mr. or Mrs. Koch. The legal title stood in Mrs. and not in Mr. Koch.

MR. DAVIS: There is no evidence that he represented himself as being the owner of this property.

MR. PALMER: The contract itself says so.

MR. DAVIS: No, it doesn't.

10

THE COURT: What does the contract say?

MR. DAVIS: Well, if counsel can point out to the court. I say it is so.

MR. PALMER: He signed his name Koch and under the name is the word "Owner."

MR. DAVIS: Yes, but that doesn't say that he repre- 20
sented himself to be the owner.

THE COURT: Is this deed for the property involved in the contract?

MR. DAVIS: Well, it is not a deed that was made subsequent to the date of that contract. Now I make the further objection, may it please the court—it is rather technical but I make the objection that the statute does not authorize the introduction of the original records in 30
the Clerk's Office; it authorizes the introduction of the original deed or a certified copy thereof. This is merely the record.

THE COURT: That is the rule, I think, Mr. Palmer

MR. PALMER: No, this is a mere matter of convenience. If they desire to have the clerk certify this record I will have it certified. For present purposes I am offering the record as it appears in the book. If there is any necessity for this to be copied and certified by the clerk I will have it done.

THE COURT: What about the deed itself, the original
10 deed?

MR. PALMER: That is not in our possession and in their custody. And the statute provides that the record of deeds as filed in the Clerk's Office may be offered in evidence and used in any case whatsoever as though the original were produced.

THE COURT: Does the statute provide that?

20 MR. PALMER: Yes.

MR. ATKINSON: My recollection of the statute is that it provides that a certified copy shall be in evidence.

THE COURT: I don't recall now just what it does provide.

MR. DAVIS: That is not the only ground. I call your Honor's attention to the other ground, which seems to be absolutely certain on the subject. This is the record
30 of a deed, as I understand, which is made on the 1st day of June, 1920, between Joseph Gaskill and Florence F. E. Koch. Now Florence F. E. Koch is not a party here. She is the wife of the defendant. Now certainly a deed made before the date of the contract and between other parties has no probative force and has no materiality.

THE COURT: I confess that I don't see that it has, Mr. Palmer.

MR. PALMER: The theory of this case, if your Honor please—

THE COURT: I haven't the papers, so I don't know what the complaint is or the answer.

MR. PALMER: No answer has ever been filed. Here
10 is a copy of the complaint.

THE COURT: No answer filed?

MR. PALMER: No. That is by agreement with Mr. Davis, that an answer would be filed consisting of a general denial.

MR. DAVIS: Yes, I guess an answer is here. I find
20 a copy in my papers.

MR. PALMER: I didn't know that any had ever been filed at all.

MR. DAVIS: I guess it was.

MR. PALMER: It apparently was. My understanding is not correct. My talk with Mr. Davis was at a time when no answer had been filed.
30

THE COURT: Well, I sustain the objection at the present time as to its materiality.

(Objection noted for plaintiff as ground of appeal.)

MR. PALMER: I desire to offer the record of a deed in Book 617, page 100, which is a deed made by Florence F. E. Koch and husband to Francis F. Foerderer, dated May 31, 1923, for property on the north side of Camden Avenue, Moorestown, Burlington County, New Jersey.

(Objected to for the same reason.)

10 THE COURT: This is the defendant, isn't it, who joined in that deed?

MR. PALMER: Yes, sir.

MR. DAVIS: Well, he joined as husband, prior to the execution of this contract. And may I also say to your Honor that I cannot see that those deeds have any materiality for the reason that he apparently joins there as husband of the grantor, but it was prior to the execution
20 of that. This is strictly upon contract, not upon tort for any deceit. Consequently how can this deed be evidence of anything?

THE COURT: Just read it again, the first part of it.

(Mr. Palmer reads.)

THE COURT: That was before the contract, wasn't it? All right. I sustain the objection. I don't see that it is
30 material. But if you can show me that it is I will be very glad to—

MR. PALMER: It is clearly material. It is a question of the transfer of the property.

THE COURT: As the case is, it doesn't make any difference, Mr. Palmer, to your contract. As I understand the situation you have proved the contract?

MR. PALMER: Yes.

THE COURT: You haven't proved the sale of the property yet, but upon the proof of the sale of the property, according to my view of it, that is your case, isn't it? 10

MR. PALMER: May I have an exception?

THE COURT: Yes.

(Objection noted for plaintiff as ground of appeal.)

MR. PALMER: I would like to offer the record of a deed from Francis B. Foerderer, Christopher Koch and Florence F. E. Koch to Louis L. Klauder, dated March 19,
20 1924, for the consideration of \$27,500, etc., house and lots of land on the north side of Camden Avenue, Moorestown, recorded in Book 630 of Deeds, page 195. That was sold subsequent to the making of the contract.

MR. DAVIS: That is objected to, may it please your Honor, for the reasons stated, and for the further reason that the sale here is between Francis Foerderer, and while Mr. and Mrs. Koch apparently have joined, it is the recitals in the deed, in fact, that Foerderer was the
30 title holder and that it was conveyed by Gaskill to Florence F. E. Koch and that the defendant in this case was not the owner and never has been the owner of the premises.

THE COURT: I overrule the objection.

(Objection noted for defendant as ground of appeal.)

DR. CHRISTOPHER KOCH, Sworn for Plaintiff.

10 DIRECT EXAMINATION BY MR. PALMER:

Q. Mr. Koch, the property No. 435 Camden Avenue was sold to Louis T. Klauder, was it not? A. Yes, sir.

Q. For what consideration? A. \$27,500.

Q. That is the property for which you signed a contract to Mr. Leconey giving him the right as the sole and exclusive agent to sell? A. Yes, sir.

20

NO CROSS EXAMINATION

PLAINTIFF RESTS

DEFENDANT'S TESTIMONY

DR. CHRISTOPHER KOCH, Recalled for Defendant.

DIRECT EXAMINATION BY MR. DAVIS:

30

Q. Now, Doctor, when did you put this property in Mr. Leconey's hands? Was it at the time of the signing of this contract or had there been a contract before that?

MR. PALMER: I object to any contract prior to this written contract.

THE COURT: I sustain the objection.

Q. After the signing of this contract did you from time to time visit Mr. Leconey? A. I did, sir.

Q. And what was the subject of your visits there?

(Objected to.)

10

THE COURT: What is the ground of the objection?

MR. PALMER: The objection is that any conversations with Mr. Leconey had no materiality in the face of the contract.

MR. DAVIS: It is subsequent to the contract, if your Honor please.

20

MR. PALMER: Subsequent to it, yes. If this contract has any validity at all it constitutes Mr. Leconey the sole and exclusive agent with the right to commission upon the sale of the property, either by himself or by the owner. We have proved that. Now any conversation with Mr. Leconey, whether Mr. Leconey made any efforts at all to sell the property or what was done is entirely immaterial and would present no defense.

(Mr. Davis replies.)

30

THE COURT: Well, I sustain the objection to the question.

(Objection noted for defendant as ground of appeal.)

Q. Mr. Koch, afterwards when you sold this property you sold it to Mr. Klauder, did you not? A. Yes, sir.

Q. Did you have any conversation with Mr. Leconey with respect to the sale of this property to Klauder, subsequent to the date of this agreement and respecting the sale of this property?

10

(Objected to.)

THE COURT: Why?

MR. PALMER: On the ground that any conversation that he had with Mr. Leconey with reference to the sale of this property is entirely immaterial to this issue as it is framed. This is based upon a contract by which the real estate agent was to receive a commission when the prop-
erty was sold. Now it would make no difference what
20 conversations were had or whether any were had between the real estate agent and the presumed owner of the property with reference to its sale.

MR. DAVIS: My answer, if your Honor please, is that this goes to the question of whether Mr. Leconey did anything or whether or not he hindered the sale.

30 (Objection sustained. Objection noted for defendant as ground of appeal.)

MR. DAVIS: Well, I suppose we might just as soon meet the question now as any time.

THE COURT: Yes, that is what I was thinking.

MR. DAVIS: We would just as soon put the question right up to the court and have him rule, if the court says that the defenses we offer are inadmissible in this case. Your Honor would just as soon rule on it now as any time?

THE COURT: Yes.

MR. DAVIS: I think my questions fairly bring out that
question. 10

THE COURT: I do, and I hold that so far as has been indicated the defenses offered are not defenses to this suit.

MR. DAVIS: In order that it can be specific on the record, I offer to show in this case that Mr. Leconey as a matter of fact did nothing; that Mr. Leconey did nothing under and pursuant to the terms of this contract; on the
20 other hand that he tried to discourage intending purchasers of this property from purchasing the property. Now that is the intent and purpose of these questions. Now if your Honor will rule upon this question.

THE COURT: I will rule, Mr. Davis, that the testimony covered by those questions and offer is not material or relevant.

MR. DAVIS: Well, that is my case, the only testimony
30 that I have to offer. I have Mr. Klauder here, whom I intended to put on the stand and prove just those things, the purchaser of the property.

THE COURT: Well, I would make the same ruling if objections were made. Is that your case?

MR. DAVIS: Yes, that is my case.

MR. PALMER: I will ask for the direction of a verdict for \$825 with interest from the date of the sale.

10 THE COURT: Do you wish to be heard on that?

MR. DAVIS: Well, of course I object to it, and I contend, of course, that we are entitled to our proof, but of course, it not being admitted, I see nothing else for your Honor to do.

THE COURT: I am therefore obliged to grant the motion and will grant the motion for a directed verdict, and I accordingly direct the jury to return in this case a
20 verdict for the plaintiff in the sum of—how much?

MR. PALMER: The interest is \$33.

THE COURT: Ladies and gentlemen of the jury, you are directed in this case to return a verdict for the plaintiff for the full amount of his claim, the claim being three per cent. upon the selling price of the property involved in this contract on which the suit is based. The selling price was \$27,500.

30 MR. DAVIS: Of course there is a mortgage there.

THE COURT: I understand there is no question raised as to the amount.

MR. DAVIS: The deed so shows that was offered in evidence.

THE COURT: Three per cent. of the gross consideration would include it, I suppose. I am not in a position, of course, now to pass upon that question that you raise, Mr. Davis. In other words, my view is that the plaintiff is entitled to recover under this contract three per cent. of the gross consideration. I do not think it would make
10 any difference under the terms of the contract whether there was a mortgage or not; the consideration would be the amount on which the commission is based.

Therefore I instruct you to return a verdict for the plaintiff for the amount of the claim, \$825, to which, of course, should be added interest on that sum, and interest should be computed from the date of the sale, when the contract was performed. The date of the sale, according to the evidence, is March 19, 1922; and interest figured from that time to this would be \$33. It is for the jury
20 to say what the interest should be, but for your convenience counsel has figured that amount out; so if you find that to be correct you should find a verdict for the plaintiff in the sum of \$858.

(Objection noted for defendant as ground of appeal.)

EXHIBIT

COPY OF CONTRACT

10 The Undersigned hereby authorizes WILLIAM G. LECONEY, as Sole and Exclusive Agent to sell the property described on the reverse hereof, which is made part of this agreement, and agrees to pay said agent 3 per cent. of the gross consideration when a sale or exchange is effected, either by the Agent or the Owner, before the revocation of this agreement. The owner may revoke this agreement at any time after 1 months, by giving 30 days written notice, providing that no negotiations are pending at the time for the sale or exchange of

20 the property. If the property is sold or exchanged subsequently to any party with whom the said agent has been negotiating, the said commission is to be paid to said agent. No verbal notice of the termination of this agreement will be recognized.

Witness my hand and seal this 6 day of July, 1923.

CHRIS KOCH (Seal)
435 Camden Ave.
Owner.

BACK OF CARD

In or near city of	Price \$35,000..
Premises No. 435 Camden Ave.	Terms \$25.00 for
Building Story 3, Roof slate.	Rent ground with 10
Rooms 1st Floor 5 2nd 5, 3rd 2	house alone.
Condition Good	Finish.
Lot alley	porch
paving sidewalk	curb and gutter.
Sewer Light in St.	Light in House.
Bath 3 Closet Laundry	Basement Cellar
Water heat	Taxes
Garage sign yes.	Water Rent.
Mrtg. Due	Int.
Insured for \$	Expires. 20
Remarks.	

BURLINGTON COUNTY CIRCUIT COURT

10 WILLIAM G. LECONEY, }
 Plaintiff. }
 vs. }
 CHRISTOPHER KOCH, }
 Defendant }
 } ACTION AT LAW
 } JUDGMENT ON
 } VERDICT

PALMER & POWELL, Attorneys.

This action was tried before Judge Frank B. Jess, with a jury, in the presence of counsel of the respective parties, on November 17, 1924; and the jury by direction of the Court returned a verdict in favor of the plaintiff 20 for \$858.

Whereupon it is adjudged that the plaintiff, William G. LeConey, recover of the defendant, Christopher Koch, the sum of \$858 and his costs, which are taxed at the sum of \$49.50; making in the whole the sum of Nine Hundred and seven dollars and fifty cents (\$907.50).

Judgment entered November 20, 1924, at 10 A. M. Book N. of Circuit Court.

30

Judgments, page 215.

NEW JERSEY SUPREME COURT

WILLIAM G. LECONEY, }
 Plaintiff-Appellee, }
 vs. } ON APPEAL.
 CHRISTOPHER KOCH, }
 Defendant-Appellant. }

10

Argued March term, 1925, before Trenchard, Min- turn, and Lloyd, JJ.

PER CURIAM. (1,2). This was an action in the Burlington county circuit court to recover commissions on a written contract between the plaintiff, LeConey, and the defendant, Koch, which entitled plaintiff to 3 per cent. commissions in the event of a sale of real estate by "the agent or the owner." The plaintiff proved the contract and a sale of the property by the owner, the defendant in 20 the case. The defendant offered to show that the plaintiff did nothing in pursuance of the agreement; that on the other hand he tried to discourage intending purchasers of the property from purchasing. The offer was overruled by the court, but no exception taken by the defendant to the ruling. The offer was probably competent, and the proofs should have been received, inasmuch as the first duty of an agent is to exercise good faith toward his principal, and failing this to forfeit his right to compensa- 30 tion (2 C. J. 760; Rogers v. Genung, 76 N. J. Eq. 306, 74 A. 473), but it has been repeatedly decided by the Court of Errors and Appeals that when rulings are in- voked an offer or objection alone is not sufficient. It frequently happens in the trial of causes that, in the dis-

position of the many legal questions which arise in the reception and rejection of evidence, the action of the court is acquiesced in, and such is the presumption unless dissent therefrom is clearly manifest in the subsequent action of counsel. *Benz v. Central R. R. of N. J.*, 82 N. J. Law, 198, 82 A. 431; *Kargman v. Carlo*, 85 N. J. Law, 635, 90 A. 292; *Baker v. Fogg & Hires Co.*, 95 N. J. Law, 230, 112 A. 406. As was said by Mr. Justice Trenchard, speaking for the Court of Errors and Appeals in the Kargman Case, *supra*.

10 "Common sense and common fairness alike require that if counsel thinks the trial judge has fallen into legal error he should call attention to it at a time and in such a manner that the judge may know that his ruling is to be made a ground of appeal, and thereby afford an opportunity to the judge to revise his ruling and to opposing counsel to modify his position so as to save error."

In the present case, no exception having been taken 20 to the refusal to admit the evidence, this action on the part of the judge cannot be here considered.

(3) The only other ground of appeal is that the court erroneously directed a verdict for the plaintiff. There were no disputed facts in the case. The contract was admitted and the sale proven. This entitled the agent to his commission, and there was no other course open to the trial judge after the exclusion of the evidence intended to establish bad faith in the agent.

Finding no error properly raised, the judgment will 30 be affirmed.

NEW JERSEY SUPREME COURT
BURLINGTON COUNTY

WILLIAM G. LECONEY, } 10
Plaintiff-Appellee, }
vs. } ACTION AT LAW
CHRISTOPHER KOCH, } NOTICE OF APPEAL
Defendant-Appellant. }

To Palmer & Powell,

Attorneys of Plaintiff-Appellee:

20 TAKE NOTICE, that the defendant appeals to the Court of Errors and Appeals of the State of New Jersey from the whole of the judgment in this case.

Respectfully,

JAMES MERCER DAVIS,

Attorney of Defendant-Appellant.

30

NEW JERSEY COURT OF ERRORS AND
AND APPEALS

10	WILLIAM G. LECONEY, <i>Plaintiff-Appellee,</i> vs. CHRISTOPHER KOCH, <i>Defendant-Appellant.</i>	}	ACTION AT LAW GROUNDS OF APPEAL
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The defendant states the following grounds of appeal:

1. Because the Court permitted to be offered in evidence the records of certain deeds between Joseph H. Gaskill and wife, and Florence Koch, between Florence Koch and one Foerder, between Foerder and one Klauder.
- 20 2. Because the Court refused to permit the witness Koch to testify as to negotiations between the plaintiff and defendant, Koch.
3. Because the Court refused to permit the defendant to show that the plaintiff was guilty of bad faith.
4. Because the Court refused to permit the defendant to show that the contract between the parties had been terminated.
5. Because the Court directed a verdict against defendant.

30	JAMES MERCER DAVIS, Attorney of Defendant-Appellant.
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NEW JERSEY COURT OF ERRORS
AND APPEALS

WILLIAM G. LECONEY, <i>Plaintiff-Appellee,</i> vs. CHRISTOPHER KOCH, <i>Defendant-Appellant.</i>	}	ACTION AT LAW SUPPLEMENTAL GROUNDS OF APPEAL	10
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The defendant states the following additional grounds of appeal:

6. Because the Court found that no proper objection had been made to the ruling of the trial court on the rejection of the proposed defense. 20
7. Because the Court found there was no disputed facts when the alleged contract was, as a matter of fact, a nudum factum.

JAMES MERCER DAVIS,
Attorney of Defendant-Appellant.

30

NEW JERSEY SUPREME COURT.

WILLIAM G. LECONEY,
Plaintiff-Appellee,

v.

CHRISTOPHER KOCH,
Defendant-Appellant.

DEFENDANT-APPELLANT'S BRIEF.

FACTS.

The defendant below executed a so-called exclusive agreement with the plaintiff, whereby the plaintiff was to have the right to sell certain real estate in the County of Burlington and was to receive a commission of three per cent. It was contended that under this agreement (S. C. 22) the plaintiff was entitled to his commission regardless of whether he secured a purchaser or not, and that the agreement or contract could have been cancelled on a written thirty days' notice.

The defendant below sold the property to a purchaser who admittedly was not a client of the plaintiff, and who had not been interested by the plaintiff in the property. The agreement was dated July 6, 1923, while the sale took place on March 19, 1924.

The plaintiff below sued to recover his commission in the Burlington Circuit Court, and at the trial the

Court directed a verdict in favor of the plaintiff. From this judgment the defendant appeals, alleging that the trial Court erred:

1. Because the Court refused to permit the defendant to show that the plaintiff was guilty of bad faith.

2. Because the Court refused to permit the defendant to show that the contract between the parties had been terminated.

ARGUMENT.

I.

One of the defenses which the defendant desired to present to the jury was the fact that the plaintiff was guilty of bad faith and that he had actually hindered the sale of the property. The offer to show such facts will be found on page 18 of the state of the case, and at line 24, the question was raised in detail, and on page 19, line 14, *et seq.*, the offer was completely set out and refused by the Court.

Under the terms of the contract, the plaintiff, Leconey, did not have the exclusive sale, but he was only made the exclusive agent; the power to sell was still reserved in the owner, and the contract expressly recognized that fact by providing that the agent was entitled to a commission regardless of whether the sale was made by the agent or the owner.

Therefore, under the terms of the contract, it was entirely proper for the owner to sell the property to a prospect discovered by him.

The query now is whether the agent is entitled to his commission if he has from time to time openly discouraged other prospects and the actual purchaser.

Ruling Case Law lays down the proposition thus, "The employee is duty bound not to act in antagonism or opposition to the interests of the employer. Everyone—whether designated agent, trustee, servant or what not—who is under contract or other legal obligation to represent or act for another in any particular business or line of business or for any valuable purpose, must be loyal and faithful to the interest of such other in respect to such business or purpose. * * * This is a rule of common sense and honesty as well as of law." Citing *U. S. v. Carter*, 217 U. S. 286, and a number of other cases. 21 R. C. L. 825, paragraph 10.

This principle is reiterated in *LeGendre, et al., v. Byrnes, et al.*, 44 N. J. Eq.

So that, under the law, as laid down by the State of New Jersey, and supported by the United States Supreme Court and numerous other State Courts, an agent is absolutely prohibited from acting in bad faith, and it is submitted that the question whether or not he is so acting is a fact question which must be determined by the jury, and that the action of the trial Court in refusing to permit such testimony and in not allowing that question to go to the jury, was prejudicial, and for that reason the judgment below should be reversed.

II.

It was further contended that the plaintiff and defendant had abandoned their contract and had made other arrangements for the disposal of this

land, other than by sale, as contemplated by the agreement.

This offer will be found on page 17, state of the case, line 4, and following.

One of the proposed defenses was that certain negotiations had been entered into by and between the plaintiff and the defendant, whereby the premises in question were to be used for another purpose, and that that purpose necessarily cancelled the contract appointing the plaintiff the sales agent.

In other words, the defendant proposed and attempted to raise a question of fact as to whether there had not been an abandonment of the contract by both the plaintiff and the defendant.

It is submitted that it was error for the trial Court to refuse such testimony. Abandonment of the contract is, as a proposition of elementary law, an absolute defense, and the sole judge as to whether or not there has been an abandonment, is the jury, who must pass upon the facts which are alleged to warrant the conclusion that there was an abandonment.

In *Rue v. Rue*, this Court held that whether a contract has in fact been abandoned, by other arrangements between the parties, is a matter for the jury to determine. *Rue v. Rue*, 21 N. J. L. 369.

It is respectfully submitted, that both of the rulings complained of were prejudicial, and that the Court erred in directing a verdict for the plaintiff; and that the judgment below should be set aside and for nothing holden.

Attorney of Defendant-Appellant.

NEW JERSEY COURT OF ERRORS
AND APPEALS

WILLIAM G. LECONEY,
Plaintiff-Respondent, }
vs. } BRIEF FOR PLAINTIFF-
CHRISTOPHER KOCH, } RESPONDENT
Defendant-Appellant. }

PALMER & POWELL,
117 Main Street, Mount Holly, N. J.,
Attorneys for Plaintiff-Respondent

STATEMENT

This suit was brought in the Burlington County Circuit by William G. Leconey, plaintiff-respondent, a real estate broker, against Christopher Koch, the presumed owner of a certain property known as No. 435 Camden Avenue, Moorestown, New Jersey, to recover commissions alleged to be due under a certain contract made between the said Leconey and Koch, dated July 6th, 1923, and marked Exhibit P-1. (S. C. page 9, line 15.)

The complaint alleges the making of a contract on July 6th, 1923, wherein and whereby defendant agreed to pay to the plaintiff a three per cent. (3%) commission on the gross sale price of said property when the same was sold either by the plaintiff or by the defendant. That said property was sold by the defendant to one Louis T.

Klauder for the sum of \$27,500.00. That upon said sale being consummated the plaintiff became entitled to the 3% commission upon said sale price, which would amount to \$825.00. (S. C. page 4.)

The answer denied the making of the contract and admitted the sale as set forth in the complaint, and set forth as a defence that the plaintiff did not use any endeavor toward the sale of the property referred to in the
10 complaint, but on the other hand discouraged the sale of said property; that the said plaintiff did not use good faith toward the defendant in the alleged undertaking. (S. C. page 5.)

The case came on for trial before Judge Frank B. Jess and a jury at the Burlington County Circuit.

At the trial the plaintiff proved the execution of the agreement (S. C. page 9, line 3). Said agreement was offered and admitted in evidence and marked Exhibit P-1. (S. C. page 9, line 15.)

20 Plaintiff then proved the sale of the property by the record of a deed wherein and whereby said property was conveyed to Francis B. Foerderer, Christopher Koch and Florence F. E. Koch to Louis T. Klauder, dated March 16, 1924, for the consideration of \$27,500.00, which deed is recorded in the Burlington County Clerk's office in Book 630 of Deeds, page 195, &c. (S. C. page 15, line 15.)

The identity of the property sold and conveyed by this deed with that covered by the contract was shown
30 by the testimony of the defendant (S. C. page 16, line 10). The plaintiff thereupon rested his case.

The defendant offered to prove as follows: "In order that it can be specifically on the record, I offer to show in this case that Mr. Leconey did nothing under and

pursuant to the terms of this contract; on the other hand that he tried to discourage intending purchasers of this property from purchasing the property. Now that is the intent and purpose of these questions." (S. C. page 19, line 15).

This defence as offered was over-ruled by the court and a verdict thereupon directed in favor of the plaintiff against the defendant for the sum of \$858.00, being the amount of commission at 3% on \$27,500.00 with interest
10 to date of trial. (S. C. page 21, line 20.)

The defendant thereupon took an appeal to this court and alleged certain reasons for the reversal of that verdict, which will be discussed in their order.

POINT I

The first reason urged for the reversal of this verdict is that the court permitted to be offered in evidence the Records of certain deeds between Joseph H. Gaskill
20 and wife and Florence Koch; between Florence Koch and one Foerderer; between Foerderer and one Klauder. The deed from Joseph H. Gaskill and wife to Florence F. E. Koch, dated June 1st, 1920, and recorded in Book 571 of Deeds, page 245, for certain property on the North side of Camden Avenue, Moorestown, N. J., was offered in evidence (S. C. page 10, line 20), but which offer was objected to and the objection was sustained by the court. (S. C. page 13, line 32.)

The record of the deed made by Florence F. E.
30 Koch and Christopher Koch, her husband, to Francis F. Foerderer, dated May 31, 1923, and recorded in Book 617 of Deeds, page 100, (S. C. page 14, line 1), was objected to and the objection sustained. (S. C. page 15, line 12.)

The offer of the record of the deed from Francis B. Foerderer and Christopher Koch and Florence F. E. Koch, his wife, to Louis L. Klauderer, dated March 19, 1924, for the consideration of \$27,500.00, for a certain house and lots of land on the North side of Camden Avenue, Moorestown, New Jersey, recorded in Book 630 of Deeds, page 195, was admitted because it was the deed wherein and whereby the defendant, Koch, conveyed
 10 the property in question. (S. C. page 16, line 1.)

This offer was objected to upon the ground that it was the record deed and that the only offer that could be made would have been the original deed or a certified copy of the record.

This question is entirely disposed of by Section 55 of "An Act Respecting Conveyances (Revision of 1808)" S. C. page 1554, as follows:

55. "The record aforesaid of any such deed
 20 or instrument of the nature or description set forth in the 21st section of this act and the transcript of such record certified to be a true transcript by the said clerk in whose office the record is kept, shall be received in evidence in any court of this State and be as good, effectual and available in law as if the original deed or instrument were then and there produced and proved."

POINT II

30 The second and third reasons assigned for reversal of this verdict can properly be argued together as they raise the question as to the admissibility of evidence tending to prove the allegations in the answer and an offer to prove such allegations, which offer was over-ruled by the court.

The contract in this case is an exclusive agency as distinguished from an exclusive right to sell, which exclusive agency has coupled with it a special contract giving the right to recover commission regardless of who makes the sale. It is controlled by a line of cases in this State which clearly and unmistakably denote the difference between an exclusive agency and an exclusive right to sell, and which cases point out the distinctive factors in each situation. And they clearly show that in cases of
 10 this kind the broker is entitled to recover his commissions when or if the sale is made by the owner.

The following cases show this situation:

"The general rule is that the right of the broker to commissions 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."
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"The broker may also by special agreement with his principal, so contract as to make his compensation dependent on a contingency which his efforts cannot control, even though it relate to the acts of his principal. A contract of that character is binding and no action can be maintained until the contingency has arisen."

Hinds v. Henry, 36 N. J. L., page 332.

"The plaintiff did not succeed in obtaining a
 30 purchaser, but the defendant never took advantage of the thirty-day clause in the agreement giving him the right to cancel. He succeeded, however, in obtaining a purchaser, and sold the farm himself for

the sum of \$3,100 to one Broughton, who had taken possession of the place at the time this suit was instituted. The suit was brought to recover the sum of \$100.00, the commission stipulated in the agreement, and these facts having been proved at the trial, and the defendant having offered no testimony, the trial court directed the jury to find a verdict for the defendant. The learned trial judge based his direction upon the well-settled principle of law, that in order to recover the plaintiff must show a substantial performance of his agreement by producing a purchaser ready and willing to take the farm upon the terms of the contract.

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Such, undoubtedly, is the general doctrine where the parties themselves have not contracted otherwise, but it is a doctrine of public policy intended to effectuate justice between the parties, and is not intended to unmake an agreement which they have deliberately executed and which fixes the terms and conditions upon which compensation shall be made.

"The case of *Hinds v. Henry*, Vroom 328, is authority not only for the general rule of law governing such cases in the absence of distinct agreement, but enunciates the law applicable to this case at bar. Mr. Justice Depue, speaking for this court, there, says:

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"The contract in the case sub judice was signed by defendant individually, and, so far as the case shows, without reference to his ownership of the property; and upon the legal principles to which we have adverted, his liability was manifest upon the happenings of the contingency described in the contract."

Kruse v. Ferber, 91, N. J. L., page 472.

10 "The allegation of the plaintiff, a domestic corporation, was that on April 23d, 1917, the defendant contracted in writing with it, whereby the plaintiff was authorized to sell a certain farm of the defendant for the sum of \$7,500, constituting plaintiff sole selling agent, and agreeing to pay a commission of five per cent., upon the selling price, 'whenever the said property should be sold.'

20 "The plaintiff, in pursuance of the contract, advertised the farm and expended money and time in negotiating for its sale. Without notice to the plaintiff, the defendant himself, within a month after the execution of the contract, sold the property for the sum of \$7,500, but refused to pay to the plaintiff the agreed commissions. The trial court found for the plaintiff, from which judgment this appeal was taken.

30 "While the general rule is that a broker to earn his commissions must be the procuring cause of the sale, the qualification has been imposed upon the rule by repeated adjudications, in this State, that the parties may by special agreement so limit the operation of the rule as to make its application depend upon the happenings of some stated certain event. Vreeland v. Vetterlein, 33 N. J. 247; Hinds v. Henry, 36 Id. 328; Payne v. Twitchell, 811d. 193; Dresser v. Gilbert, Id 358.

"The last case cited presents an instance where the owner contracted to pay the stipulated commission to the agent, upon a sale of the property, 'by him, me or any other person,' and this court held upon a sale of the property, by the owner himself, that the contingency presented by the contract thereby arose, and that the agent was entitled to his commission.

"In that case we stated as ratio decidendi that the general rule governing the status between the parties was a 'doctrine of public policy intended to effectuate justice between the parties, and is not intended to unmake an agreement which they deliberately executed, and which fixes the terms and conditions upon which compensations shall be made.' The language presented by the contract in the case at bar is equally without qualification and is emphatic and specific in statement."

Stevenson Co. v. Oppenheimer, 91, N. J. L., page 479

20 "It is an accepted rule of construction that a contract of employment does not give the broker an exclusive agency, unless it is so specified, either expressly or by implication. 19 Cyc; 9 C. J. 623.

30 "A general rule which is supported by the weight of authority is to the effect that when the owner of real estate places it in the hands of a real estate broker for sale, he does not thereby relinquish his right to sell the property himself independent of the broker (4 R. C. L. 318 No. 56; 9 C. J. 622); so, it is said, that when the broker is given an exclusive agency, as distinguished from an exclusive right to sell, it merely precludes the owner from employing another broker and does not preclude the owner from making a sale himself, without the broker's aid, and

in such a case the owner will not be liable to the broker for commissions (9 C. J. 622), unless there is a special contract giving a right to commissions regardless of who makes the sale, as in *Kruse v. Ferber*, 91 N. J. L. 470; *Stevenson Co. v. Oppenheimer*, Id. 479; or unless the owner does not notify the broker of the sale, as in *Payne v. Twitchell*, 8, Id. 193."

Ettinger v. Loux, 96 N. J. L., page 524.

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The foregoing cases clearly show the principles of law covering this situation, and that they conclusively show that the verdict should be sustained.

POINT III

The fourth reason urged for reversal of this verdict is that the court refused to permit the defendants to show that the contract between the parties had been terminated.

20 The case is entirely devoid of any offer or suggestion that would indicate any proposition tending to show that the contract had been terminated.

POINT IV.

The fifth reason urged for the reversal of this verdict is that the court directed a verdict for the defendant. There was nothing else for the trial court to do. The facts were undisputed, the contract being admitted and 30 the sale proved. In this situation the court having refused to admit any testimony tending to show bad faith on the part of the agent, there was nothing left for the court to do but direct a verdict in favor of the plaintiff. There

was no dispute as to the amount due, nor that the plaintiff was entitled to interest on this amount.

This matter is disposed of by the opinion of the Supreme Court in this case.

POINT V.

The sixth reason urged for the reversal of this verdict, is that the court found that no exception had been taken to the ruling of the court in the rejection of proposed evidence of bad faith on the part of the agent. 10

There can be no question about the law upon this subject. No objection was taken to the court's ruling and in the absence of any exception there was nothing that the Supreme Court could consider and consequently nothing that this court can take action upon.

This matter has been repeatedly decided in this court and there can be no question about the law on the subject.

In the case of *Kargman vs. Carlo*, 85, N. J. Law, at 20 page 635, Justice Trenchard, in speaking for this court:

"The rule is that no ruling relating to the reception or rejection of evidence will be reviewed unless the record discloses that an objection to such ruling was duly made or such ruling otherwise challenged at the time of the ruling.

"The reason for this rule may be gathered from the remarks of Mr. Justice Garrison in *Benz vs. Central Railroad of New Jersey*, 53 Vroom 197. It 30 is not based on technical or captious grounds, but, on the contrary is essential to the administration of justice with due regard to provide interests and the policy against needless litigation. Common sense

and common fairness alike required that if counsel thinks the trial judge has fallen into legal error he should call attention to it at a time and in such manner that the judge may know that his ruling is to be made a ground of appeal, and thereby afford an opportunity to the judge to revise his ruling and to opposing counsel to modify his position so as to save error. Where at the trial the attention of the judge is not called to an alleged error the abiding presumption will be that the correction of the error at the trial was not desired by the party who complains of it on appeal.”

See also *Baker vs. Fogg and Hiers Company*, 95 N. J. Law, 230.

POINT VI

20 The seventh reason urged for a reversal is not argued and therefore may be considered as being abandoned.

It is therefore respectfully submitted that the judgment in this case should be affirmed with costs.

PALMER & POWELL,
Attorneys for Plaintiff-Respondent.