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Agency and Partnership

Ernest E. Specks

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AGENCY AND PARTNERSHIP

LEASE OPTION CONTRACTS—LIABILITY FOR BROKER'S COMMISSION

Arkansas. As a general proposition, all that is necessary to be done in order to entitle a real estate broker to his commission is for such broker to procure a purchaser ready, able and willing to buy on the terms set out in the listing agreement by the vendor.¹ But to what compensation, if any, is the broker entitled if he procures a person who enters into a lease contract with an option to purchase when the option is exercised by the lessee after expiration of the listing agreement? In the case of *Harrison v. United Farm Agency*² the court was faced with such a question.

The realty which was the subject matter of the listing agreement between the plaintiff broker and Harrison was owned by Harrison's wife. Having procured a prospective buyer, the broker prepared a lease contract which contained an option to purchase the property for the same price as that specified in the listing agreement. The lease was signed by the lessee and Harrison. Before the option expired, but after the time limit provided for in the listing agreement expired, Mrs. Harrison entered into a contract of sale with the lessee. Although initially Mrs. Harrison had no knowledge of the lease-option contract, the court found that she ratified the contract entered into by her husband. An action was brought by the realty agent against the Harrisons for commissions due on the sale of the farm. The circuit court entered judgment for the plaintiff, and the defendants appealed.

It was specifically argued by the defendants that the judgment should be reversed because the sale was not consummated within the time provided in the listing agreement. The court agreed that in the usual case the defendants' contention would be correct. But the court, stressing the fact that it was dealing with a series

¹ 2 MECHEM, AGENCY (2d ed. 1914) § 2430; 2 RESTATEMENT, AGENCY (1933) § 445.

²Ark., 262 S.W. 2d 293 (1953).

of written instruments which were all linked together, concluded that under the facts of the case Mrs. Harrison, by failing to repudiate the lease-option contract and by executing a sales contract with the purchaser produced by the plaintiff before the lease-option contract had expired, in effect agreed to an extension of the listing agreement.

The general rule applicable to the lease-option cases, as broadly stated by the courts, is that a broker employed to sell is not entitled to compensation where he procures a party to take an option and the option is not exercised, but the broker's right to commission accrues if the option is subsequently exercised.³

The rationale of the cases in which the option is not exercised is that since the broker was employed to sell the property, his right to commission has not accrued, for there has been no sale, the acceptance of the lease-option contract not being construed as a waiver of the original terms of the listing agreement.⁴ However, if the option is exercised, the courts hold that the broker is entitled to commission by applying the "waiver" and "procuring cause" theories; *i.e.*, through the efforts of the broker a sale was consummated which was acceptable to the vendor.⁵ The question of whether the broker procured a purchaser ready, able and willing to buy is considered moot, for a sale has been consummated.⁶

There are numerous cases supporting the above-mentioned view,⁷

³ Cases in which the option was not exercised: *Zin v. Ex-Cell-O Corp.*, 24 Cal. 2d 290, 149 P. 2d 177 (1944); *Mendenhall v. Adair Realty & Loan Co.*, 67 Ga. App. 154, 19 S.E. 2d 740 (1942); *Le Baron Home v. Pontiac Housing Fund*, 319 Mich. 310, 29 N.W. 2d 704 (1947); *Mahoney v. Pitman*, 43 S.W. 2d 143 (Tex. Civ. App. 1931) *er. ref.*; 2 MECHEM, AGENCY (2d ed. 1914) § 2443. For a discussion of options that were exercised see: *McCurry v. Hawkins*, 83 Ark. 202, 103 S.W. 600 (1907); *Murray v. Miller*, 112 Ark. 227, 166 S.W. 536 (1914); 2 MECHEM, AGENCY (2d ed. 1919) §§ 2439, 2446. Also see Note, 23 A.L.R. 856 (1922).

⁴ 2 MECHEM, AGENCY (2d ed. 1914) § 2443; also see Note, 23 A.L.R. 856 (1922), and authorities cited *supra* note 3.

⁵ See note 3 *supra*.

⁶ *Mahoney v. Pitman*, 43 S.W. 2d 143 (Tex. Civ. App. 1931) *er. ref.*; *Waurika Oil Ass'n No. 1. v. Ellis*, 232 S.W. 364 (Tex. Civ. App. 1921); *Black v. Wilson*, 187 S.W. 493 (Tex. Civ. App. 1916) *er. disp.*; 12 C. J. S., *Brokers*, § 86 and authorities cited.

⁷ See authorities cited *supra* notes 3 and 4.

but it does not appear from the reports of these cases whether the option was exercised during the effective period of the listing agreement or after the time limit in the listing agreement had expired (if there was a time limit). It is submitted by logically applying the "waiver" and "procuring cause" theories one cannot make a distinction with respect to the time of exercising the option. The reasoning of the court in the instant case appears to apply both of the previously mentioned theories.⁸

The conclusion reached by the court that by accepting or failing to repudiate the lease-option contract the defendant consented to an extension of the listing agreement compels the result that the broker was entitled to commissions; for if the listing agreement is in effect, there is no problem as to the sale being made after the effective dates of the listing agreement and there is little question under the facts of the case that the broker was the procuring cause of the sale.

MASTER'S LIABILITY FOR WILFUL TORT OF A SERVANT

Oklahoma. In *Oklahoma Railway Co. v. Sandford*,⁹ the court decided an interesting case involving the liability of a master for the wilful tort of a servant. Sandford, plaintiff, sued the defendant railway company for damages caused by an assault and battery committed by a bus driver of the defendant company. As appears from the opinion, the plaintiff, while driving in front of the bus, had stopped abruptly without apparent reason. On another occasion he had stopped his car in a bus zone and had refused to move. On still another occasion the plaintiff had cut in front of the bus nearly causing an accident. Succeeding in passing the

⁸ Language of the opinion indicating reliance on "procuring cause": "It is abundantly clear that the lease-option contract was a direct result of the Listing Agreement which Mrs. Harrison signed." 262 S.W. 2d at 297. Reliance on the "waiver" theory is indicated by the following language: ". . . under all the facts and circumstances . . . Mrs. Harrison, by failing to repudiate the lease-option contract . . . and by executing a sales contract . . . before the lease-option contract had expired, in effect agreed to an extension of the Listing Agreement." *Id.* at 296, 297.

⁹ ____Okla., 258 P. 2d 604 (1953).

plaintiff's car, the bus driver pulled over to the curb blocking the plaintiff's way. The bus driver left the bus to talk to the plaintiff, and, noticing that the plaintiff had been drinking, planned to hold him until the police arrived. But in an attempt to remove the plaintiff from his car, the bus driver committed the assault and battery complained of.

A judgment obtained by the plaintiff in the trial court was reversed by the supreme court on the ground that the bus driver's conduct was not within the scope of his employment.

Though agreeing that a master may be held liable for wilful torts of a servant, the court refused to hold that the bus driver was acting within the scope of his employment. To reach that conclusion, the court emphasized two elements of the case. The first was the locale factor; *i.e.*, the assault and battery occurred in a place not normally utilized to discharge or load passengers. The court was careful to note that the actions of the bus driver were not related to a desire to protect the defendant's property or the safety of the defendant's passengers and that there had not been a previous accident requiring the bus driver to stop at the place where the assault and battery occurred. Secondly, the court emphasized the time element for the purpose of establishing that the bus driver's intentions were foreign to the interests of his master. For the assault and battery did not take place, the court observed, until after the provoking incidents had been completed and the bus driver had succeeded in passing the plaintiff.

The court's decision is in accord with the decisions of other courts in cases involving similar fact situations.¹⁰ However, the line between liability or no liability contains a greater degree of uncertainty than a cursory study of the opinion would reveal. A

¹⁰ Georgia Power Co. v. Shipp, 195 Ga. 598, 24 S.E. 2d 764 (1943); Plotkin v. Northland Transp. Co., 204 Minn. 422, 283 N.W. 758 (1939); Johnson v. M. J. Uline Co., Inc., 40 A. 2d 260 (D. C. Munic. App. 1944); Texas & P. Ry. Co. v. Hagenloh, 151 Tex. 191, 247 S.W. 2d 236 (1952); Barney v. Jewel Tea Co., Inc., 104 Utah 292, 139 P. 2d 878 (1943).

persuasive argument can be made that the bus driver's conduct was in the interest of the safety of the defendant's passengers, for it was possible that a recurrence of the plaintiff's antics would result in an accident. The facts were not so clear as to establish that the bus driver had stepped completely outside the scope of his employment. If the bus driver performed his acts with mixed intentions or if there was only a slight deviation from service, there is authority for holding the master liable.¹¹ Also, when approached for this point of view, the locale factor loses much of its significance.

On the other hand, if the master is to be held liable for the battery of an employee on persons who are hindering or obstructing the employee in the performance of his immediate duties,¹² the time factor assumes special significance. For in this case the obstruction or hindrance had been abated before the assault and battery occurred.

The decision in the *Sandford* case should be distinguished from cases in which the master's liability is based on non-agency principles; e.g., the carrier,¹³ innkeeper,¹⁴ or storekeeper¹⁵ situations. Also, the case must be distinguished from cases in which the services to be performed contemplate the use of force or are of such a nature that they are commonly accompanied by force; for in those cases the possibility of attaching liability to the master is increased.¹⁶

When consideration is taken of the fact that the interference

¹¹ *Brayton v. Carter*, 196 Okla. 125, 163 P. 2d 960 (1945); 1 RESTATEMENT, AGENCY (1933) § 236.

¹² 1 RESTATEMENT, AGENCY (1933) §§ 235, 236; but see 2 MECHEM, AGENCY (2d ed. 1914) §§ 1978, 1979.

¹³ *Yazoo & M.V.R. Co. v. Smith*, 188 Miss. 856, 196 So. 230 (1940); *Hairston v. Atlantic Greyhound Corp.*, 220 N.C. 642, 18 S.E. 2d 166 (1942); *Barad v. New York Rapid Transit Corp.*, 162 Misc. 458, 295 N. Y. Supp. 901 (Munic. Ct. 1937).

¹⁴ *Mayo Hotel Co. v. Danciger*, 143 Okla. 196, 288 Pac. 309 (1930).

¹⁵ *Robinson v. Sears, Roebuck & Co.*, 216 N.C. 322, 4 S.E. 2d 889 (1939).

¹⁶ *State ex rel. Gosselin v. Trimble*, 328 Mo. 760, 41 S.W. 2d 801 (1931); *Morin v. Peoples' Wet Wash Laundry*, 85 N.H. 233, 156 Atl. 499 (1931); 1 RESTATEMENT, AGENCY (1933) § 245; see Note, 22 A.L.R. 2d 1220 (1951).

by the plaintiff was past interference, not immediately hindering the driver, the only factor connecting the battery with the employment was the prevention of future annoyance. But by the better view this was not enough. For merely because the master has entrusted to a servant the performance of a duty, the master should not be held responsible for whatever method the servant may adopt in attempting performance.¹⁷

PARTNER'S LIABILITY FOR FUNDS DERIVED FROM NOTE SIGNED BY ANOTHER PARTNER AND USED IN PARTNERSHIP BUSINESS

Texas. In *First State Bank of Riesel v. Dyer*¹⁸ the bank sued Dyer and Woodside, doing business as Waco Gibson Tractor Sales, to recover on a note signed by Woodside and his wife, but not purporting to be the obligation of the partnership; or in the alternative to recover on the debt for which the note was given. The partnership received the money and used it in the partnership business. However, the only evidence to show knowledge of Dyer or his acquiescence or adoption of Woodside's act consisted of monthly financial statements furnished by Woodside to Dyer showing a notes payable balance without any description of the creditors to whom the notes were payable. The bank knew that Dyer was a partner but made no demand that Dyer sign the note or that the partnership name be signed thereto. Upon motion by Dyer, the trial judge instructed a verdict in his favor, which was affirmed by the court of civil appeals.

In affirming the judgment below, the supreme court first pointed out that there could be no recovery against Dyer on the note because of Section 18 of the Negotiable Instruments Law,¹⁹ which provides that no person is liable on an instrument whose signature does not appear thereon. In such a case it is arguable

¹⁷ 2 MECHAM, AGENCY (2d ed. 1914) § 1978; Plotkin v. Northland Transp. Co., 204 Minn. 422, 283 N.W. 758 (1939).

¹⁸ ____Tex_____, 254 S.W. 2d 92 (1953).

¹⁹ TEX. REV. CIV. STAT. (1948) art. 5932, §18.

that the partnership may nevertheless be liable on the underlying debt, as distinguished from the note, where the borrowing agent has the requisite authority to bind the partnership and the intention of the parties is that the partnership shall in fact be bound.²⁰ The court found in this case that an intention to bind the partnership as such was lacking because the bank, although knowing about the partnership, failed to request that the note be in the partnership's name or that Dyer's name be added; the court further noted that the question of partnership liability was apparently not discussed. The court also said that there was no evidence of ratification or adoption of the agreement on the part of Dyer, and specifically no evidence that he knew the partnership was employing or benefiting from the proceeds of this particular loan.

Apparently as an independent ground for decision, the court also said, without supporting authority, that when a direct action upon a note is for some reason barred, an action may be brought on the underlying debt only where the debt is an antecedent one. It is a fact that cases permitting recovery upon an underlying debt have typically involved an antecedent debt.²¹ But there appears to be neither authority nor reason for a rule that the debt must in all cases be an antecedent one. It would be a harsh rule indeed which would prevent restitution in a case where there is a knowing acceptance of benefits,²² and the court's careful exploration of this point indicates that it was sensitive to the problem.

Without a knowing acceptance of the benefits, personal liability for the entire loan on the part of the innocent partner is less

²⁰ *Mills v. Riggle*, 83 Kan. 703, 112 Pac. 617 (1911); *Ravold v. Fred Beers, Inc.*, 270 N. Y. Supp. 894 (1933); *Smith v. Stock Yards Loan Co.*, 186 Okla. 152, 96 P. 2d 55 (1939); *Karchmer v. Unger*, 186 Okla. 53, 96 P. 2d 300 (1939); *Wenzel v. Brooks-Asbeck, Inc.*, 211 S.W. 2d 611 (Tex. Civ. App. 1948) *er. ref. n.r.e.*; *Miller v. White*, 112 S.W. 2d 487 (Tex. Civ. App. 1937) *er. disp.*; *Sheehan v. Hudman*, 49 S.W. 2d 953 (Tex. Civ. App. 1932); *Miller v. McCord*, 159 S.W. 159 (Tex. Civ. App. 1913).

²¹ *Otto v. Half*, 89 Tex. 384, 34 S.W. 910 (1896); *Benson v. Adams*, 274 S.W. 210 (Tex. Civ. App. 1925); *Dockery v. Faulkner*, 101 S.W. 501 (Tex. Civ. App. 1907).

²² 1 RESTATEMENT, AGENCY (1933) §§ 151(d), 152(c); RESTATEMENT, RESTITUTION (1937) §§ 15, 142; also see authorities cited *supra* note 20.

justifiable, but where the funds have in fact been used for partnership purposes, recovery against the joint partnership property does seem warranted. The decision in the instant case does not preclude such recovery. If Woodside's interest in the partnership property is equal to the amount of the loan, there is of course no problem on this score. It should be noted, moreover, that Woodside's interest in the partnership property probably includes a claim against the partnership for the amount of the money he borrowed from the bank and then employed for partnership purposes. That such a claim exists can be supported by two theories: first, that Woodside made a loan of the money to the partnership; or second, that as an agent of the partnership Woodside incurred liability for which he is entitled to indemnification.²³ On either theory Woodside's claim is one which the bank should be able to reach by a proceeding akin to garnishment.²⁴

Ernest E. Specks.

²³ *Cf.* *Bibb v. Allen*, 149 U. S. 481 (1893); *Evans, Coleman & Evans v. Pistorino*, 245 Mass. 94, 139 N.E. 848 (1923); see 2 RESTATEMENT, AGENCY (1933) § 439.

²⁴ See note 23 *supra*.