NORTH CAROLINA
REAL ESTATE LICENSING BOARD

Real Estate Bulletin

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SPECIFIC PERFORMANCE DENIED

In a recent decision by the North Carolina Court of Appeals in the case of HAYMAN v. ROSS, 22 N. C. App. 624, the plaintiff was denied specific performance of an alleged contract for the sale of real property.

The evidence showed the parties had orally agreed by telephone through their respective agents to the sale of the property and plaintiff's broker had written a letter to the defendant informing her of the receipt of plaintiff's check as a binder on the property. The defendant subsequently decided not to sell and plaintiff filed suit for specific performance.

FROM THE COURT'S OPINION:

Since this is a transaction involving the transfer of real property it is governed by G.S. 22-2 (the statute of frauds) which reads in pertinent part as follows:

> "All contracts to sell or convey any lands, tenements, or hereditaments, or any interest in or concerning them . . . shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized."

It is settled law in this jurisdiction that the owner of land may sell this land through an agent and the agent may sign a contract to sell and convey in his own name or in the name of his principal(s). **Lewis v. Allred,** 249 N.C. 486, 106 S.E. 2d 689 (1959). Furthermore, in 12 Am. Jur. 2d, Brokers, § 67, p. 821, it is stated:

> "Ordinarily a broker does not act in a dual capacity as the representative of both sides to a negotiation, but only as the agent of the party who first employed him. Once a deal is concluded, however, the law permits him to act as the representative of both parties **if they assent thereto,** for the purpose of signing a memorandum sufficient to take the transaction out of the statute of frauds." (Emphasis added.)

In the present case plaintiff does not contend that the defendant signed a contract or memorandum to sell her property to plaintiff. However, plaintiff does contend that Frank B. Cook in writing the letter of 27 January 1973 was acting as agent for both parties and that this letter supplies the necessary writing required by G.S. 22-2. We do not agree. This letter is as follows:

> "Exhibit C — Letter From Frank B. Cook dated January 27, 1973
>
> Mrs. Mary Norton Ross
> 5414 Riviera Drive
> Coral Gables, Florida
>
> Re: Shop Sale
>
> Dear Mrs. Ross:
>
> I have received a check from Mr. W. Zack Hayman in the amount of $2,500.00 (Two Thousand Five Hundred Dollars) to be deposited in my Trust Account and held as a binder on the sale of your Highlands Dress Shop, Building, Contents and Good Will excepting such personal items as agreed to by you and Mr. Hayman. The sale to include Lots 201-303-205 and 207 as shown by a plat drawn by

(Continued on Page 2)

MAY A BROKER ACCEPT A COMMISSION ON PROPERTY HE PURCHASES FOR OWN ACCOUNT?

It is common for a broker to approach a seller of property, and offer to purchase the property himself. During the negotiations over the price the broker may ask that the seller pay the usual commission to the broker. In this manner the broker obtains a 6 per cent advantage over other purchasers.

Although the above relationship is quite common, it is very dangerous for the broker. By accepting a commission on the sale, the broker activates the Principal - Agent relationship with all its implications.

A recent California case (Byrens vs. Dept. of RE, unpublished) a broker offered to purchase real estate held by the bank's trust department. The trust officer agreed to pay a commission if the broker purchased the property. Another bidder for the property appeared at the hearing in the probate court. The broker entered into an agreement with the other party to not bid against each other. The sale was closed and the broker was paid a commission by the bank.

The brokers license was suspended for 120 days after hearing, and the broker appealed to the courts. The alleged violation was the side contract between the bidders to prevent a higher sales price. If the broker was the agent of the bank, he owed the duty to see that the property was sold for the highest possible price.

The broker contended that the commission paid was merely a discount given to all brokers who purchased property from the bank. If this was true, the principal-agent relationship did not exist. The court held that the records in the probate court confirmed that he was paid a commission, and he had a duty to

(Continued on Page 4)

REAL ESTATE BULLETIN

Published quarterly as a service to real estate licensees to promote a better understanding of the Real Estate Licensing Law, Rules and Regulations, and proficiency in ethical real estate practice.

LICENSE STATISTICS

Licensees as of September 30, 1974

Brokers	17,362
Salesmen	3,395
Corporations	1,100

Examination — July 1974

	Passed	Failed
Brokers	301	322
Salesmen	68	85

Examination — August 1974

	Passed	Failed
Brokers	180	281
Salesmen	84	102

Examination — September 1974

	Passed	Failed
Brokers	165	379
Salesmen	81	74

LICENSES SUSPENDED/REVOKED

CALVIN C. HENSON, Franklin — Revoked broker's license — Violation of G.S. 93A-6(a) (1), (7), (8), (12). (Appealed to Superior Court).

ERVIN D. QUICK, Jacksonville — Suspended broker's license for 6 months — Violation of G.S. 93A-6(a) (1), (8). (Appealed to Superior Court).

M. D. WOODARD, Jacksonville — Suspended broker's license for 90 days — Violation of G.S. 93A-6(a), (8). (Appealed to Superior Court).

(Continued From Page 1)

Charlie McDowell, Land Surveyor, dated March 11, 1968. Seller to pay closing cost. 1973 Real Estate Taxes to be prorated as date of closing.

It being agreed and understood that the sale price is $60,000.00 (Sixty Thousand Dollars) purchaser to assume the outstanding mortgage or Deed of Trust in the amount of $9,800.00, (Nine Thousand Eight Hundred Dollars) leaving a balance of $50,200.00 (Fifty Thousand Two Hundred Dollars) to be paid in cash at Closing around February 16, 1973. The sale is subject to a good and merchantable title.

Sincerely yours,

s/ F.B.C.
Frank B. Cook

A careful analysis of all of the evidence before us clearly establishes that any agreement between the plaintiff and defendant with respect to the sale of the property in question was oral and that Cook was acting solely on behalf of the plaintiff and was not authorized (either expressly or impliedly) by the defendant to act on her behalf. Thus, there being no writing sufficient to comply with G.S. 22-2, we are of the opinion that the trial court correctly concluded that the defendant was entitled to judgment as a matter of law.

BOARD JUDGMENT MODIFIED

A recent judgment of the Licensing Board revoking the broker's license of Kenneth Foscue, Foscue Realty, Atlantic Beach, was modified by the Superior Court of Carteret County as a result of an appeal by the respondent. The Court decreed the respondent's license be suspended for a period of one year effective October 2, 1974.

ELECTED

At the recent Annual Conference of the National Association of Real Estate License Law Officials at Scottsdale, Arizona, Licensing Board members Edwin W. Tenney, Jr., and C. Bayless Ridenhour, were elected to national office. Mr. Tenney was elected a Vice President and Mr. Ridenhour a Director to represent the North Central District.

The Association is composed of real estate commissioners and administrators from the fifty states, District of Columbia, Virgin Islands, and several Canadian provinces. The primary objective of the Association is the better administration and enforcement of real estate license laws.

COMPLAINTS

Most of the complaints received by the Licensing Board involve the mishandling of trust funds. Real estate licenses are subject to suspension or revocation if the licensee is guilty of **"Commingling the money or other property of his principals with his own or failure to maintain and deposit in a trust or escrow account in an insured bank or savings and loan association all money received by a real estate broker acting in said capacity, or as escrow agent, or the temporary custodian of the funds of others, in a real estate transaction; provided, such accounts shall not bear interest unless the principals authorize in writing the deposit be made in an interest bearing account and also provide for the disbursement of the interest thereon."**

The Licensing Law also requires that **"Records relative to the deposit, maintenance, and withdrawal of the money or other property of his principals shall be properly maintained by a broker and made available to the Board or its authorized representative when the Board determines such records are pertinent to the conduct of the investigation of any specific complaint against a licensee."**

(Continued From Last Issue)

Chapter 47A. Unit Ownership Act

§ 47A-10. Compliance with bylaws, regulations and covenants; damages; injunctions. — Each unit owner shall comply strictly with the bylaws and with the administrative rules and regulations adopted pursuant thereto, as either of the same may be lawfully amended from time to time, and with the covenants, conditions and restrictions set forth in the declaration or in the deed to his unit. Failure to comply with any of the same shall be grounds for an action to recover sums due, for damages or injunctive relief, or both, maintainable by the manager or board of directors on behalf of the association of unit owners or, in a proper case, by an aggrieved unit owner.

§ 47A-11. Unit owners not to jeopardize safety of property or impair easements. — No unit owner shall do any work which would jeopardize the soundness or safety of the property or impair any easement or hereditament without in every such case the unanimous consent of all the other unit owners affected being first obtained.

§ 47A-12. Unit owners to contribute to common expenses; distribution of common profits. — The unit owners are bound to contribute pro rata, in the percentages computed according to § 47A-6 of this chapter, toward the expenses of administration and of maintenance and repair of the general common areas and facilities and, in proper cases of the limited common areas and facilities, of the building and toward any other expense lawfully agreed upon. No unit owner may exempt himself from contributing toward such expense by waiver of the use or enjoyment of the common areas and facilities or by abandonment of the unit belonging to him.

Provided, however, that the common profits of the property, if any, shall be distributed among the unit owners according to the percentage of the undivided interest in the common areas and facilities.

§ 47A-13. Declaration creating unit ownership; contents; recordation. — The declaration creating and establishing unit ownership as provided in § 47A-3 of this chapter, shall be recorded in the office of the county register of deeds and shall contain the following particulars:

(1) Description of the land on which the building and improvements are or are to be located.

(2) Description of the building, stating the number of stories and basements, the number of units, and the principal materials of which it is constructed.

(3) The unit designation of each unit, and a statement of its location, approximate area, number of rooms, and immediate common area to which it has access, and any other data necessary for its proper identification.

(4) Description of the general common areas and facilities and the proportionate interest of each unit owner therein.

(5) Description of the limited common areas and facilities, if any, stating what units shall share the same and in what proportion.

(6) Statement of the purpose for which the building and each of the units are intended and restricted as to use.

(7) The name of a person to receive service of process in the cases hereinafter provided, together with the residence or the place of business of such person which shall be within the city and county in which the building is located.

(8) Any further details in connection with the property which the person executing the declaration may deem desirable to set forth consistent with this chapter.

(9) The method by which the declaration may be amended, consistent with the provisions of this chapter.

§ 47A-14. Deeds conveying units; recordation; contents. — Deeds conveying a unit ownership shall be recorded in the office of the register of deeds in the county in which the land and building is located and shall contain the following particulars:

(1) Description of the land as provided in § 47A-13 of this chapter, including the book and page numbers and the date of recording of the declaration.

(2) The unit designation as contained in the declaration and any other data necessary for its proper identification.

(3) A clear expression of the use for which the unit is intended and restrictions on its use.

(4) The percentage of undivided interest appertaining to the unit in the common areas and facilities.

(5) Any further details which the grantor and grantee may deem desirable to set forth consistent with the declaration and this chapter.

(To Be Continued In Next Issue)

TITLE INSURANCE KICKBACKS PROHIBITED

An act passed by the North Carolina General Assembly which became effective July 1, 1974, prohibits the payment of kickbacks and rebates by title insurance companies to persons selling real property or performing services as real estate agents, attorneys or lenders. The act, apparently, does not prohibit such persons from acting as bona fide licensed title insurance agents in transactions in which they are not also involved as real estate agents, attorneys or lenders. The provisions of the act follow:

Chapter 58.
SUBCHAPTER II. INSURANCE COMPANIES
Article 15.
Title Insurance Companies and Land Mortgage Companies Issuing Collateral Loan Certificates.

§ 58-135.1. Prohibition against payment or receipt of title insurance kickbacks, rebates, commissions and other payments. — (a) No person or entity selling real property, or performing services as a real estate agent, attorney or lender, which services are incident to or a part of any real estate settlement or sale, shall pay or receive, directly or indirectly, any kickback, rebate, commission or other payment in connection with the issuance of title insurance for any real property which is a part of such sale or settlement; nor shall any title insurance company, agency or agent make any such payment.

(b) Any person or entity violating the provisions of this Chapter shall be guilty of a misdemeanor and subject to a fine of not more than one thousand dollars ($1,000), or imprisonment for not more than six months, or both, in the discretion of the court.

(c) No persons or entity shall be in violation of this section solely by reason of ownership of stock in a bona fide title insurance company, agency, or agent. For purposes of this section, and in addition to any other statutory or regulatory requirements, a bona fide title insurance company, agency or agent is defined to be a company, agency or agent that passes upon and makes title insurance underwriting decisions on title risks, including the issuance of title insurance policies, binders and endorsements, and that maintains a separate and distinct staff and office or offices for such purposes. (1973, c. 1336, s. 1.)

EXAMINATION SCHEDULE

FILING DATE	EXAM DATE
December 20, 1974	January 25, 1975
January 17	February 22
February 14	March 22
March 21	April 26
April 18	May 24
May 23	June 28

(Continued From Page 1)

reveal the arrangement between himself and the other buyer.

When accepting commissions the broker owes the utmost fidelity to the seller and the obligation to reveal every fact regarding the transaction. It was considered dishonest dealings to fail to reveal to the bank that he had a joint venture with another purchaser.

CAVEAT: Brokers should never accept commissions from sellers on property they purchase for their own account. If a discount is desired, it should be reflected in the lowering of the contract sales price, never showing it as an earned commission.

Living Real Estate Law
San Antonio, Texas

FLORIDA CASE

In a recent case decided in the Florida District Court of Appeal, CHANTON v. DRUCKER, 299 So. 2d 145, plaintiff real estate broker was denied recovery of a $19,500 commission in a suit against the defendant owner of property because the purchaser procured by the broker was not **financially** able to purchase the property upon the proposed terms and conditions of the sale.

The broker alleged that she had, in accordance with a verbal listing contract, procured a purchaser who was "ready able and willing" to purchase the property for the purchase price of $325,000. The purchaser had deposited with the broker a $1,000 check as earnest money, but retained control over the check by having the broker not deposit or cash the check until the transaction was completed. The purchaser was to pay $100,000 down payment but only had $85,000 and it was necessary for him to look to someone else for financial assistance. He was looking to the plaintiff broker to advance him a portion of her commission in order to raise the necessary down payment. There was no evidence the would-be purchaser had any financial support from a legally obligated source sufficient to carry forward the transaction.

The Court, in ruling against the broker, said: "The law is well settled in this state that before a realtor may be entitled to a commission, some proof is required to show that the person who would be the purchaser is financially able to command the necessary money to close the deal on reasonable notice at the time agreed upon."

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REAL ESTATE LICENSING BOARD
P. O. BOX 266
RALEIGH, N. C. 27602

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HIGGINS SR, JERRY L

807 PINELAND DR
CARY NC 27511