

JULIO DANON, PLAINTIFF AND APPELLEE, VS. ANTONIO A. BRIMO & CO., DEFENDANT AND APPELLANT.*G. R .No. 15823. September 12, 1921*

Ponente: JOHNSON, J.

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This action was brought to recover the sum of P60,000, alleged to be the value of services rendered to the defendant by the plaintiff as a broker. The plaintiff alleges that in the month of August, 1918, the defendant company, through its manager, Antonio A. Brimo, employed him to look for a purchaser of its factory known as "Holland American Oil Co.," for the sum of P1,200,000, payable in cash; that the defendant promised to pay to the plaintiff, as compensation for his services, a commission of five per cent on the said sum of P1,200,000, if the sale was consummated, or if the plaintiff should find a purchaser ready, able and willing to buy said factory for the said sum of P1,200,000; that subsequently the plaintiff found such a purchaser, but that the defendant refused to sell the said factory without any justifiable motive or reason therefor and without having previously notified the plaintiff of its desistance or variation in the price and terms of the sale.

To that complaint the defendant interposed a general denial. Upon the issue thus presented, the Honorable Simplicio del Rosario, judge, after hearing and considering the evidence adduced during the trial of the cause, rendered a judgment in favor of the plaintiff and against the defendant for the sum of P60,000, with costs. From that judgment the defendant appealed to this court.

The proof with regard to the authority of the plaintiff to sell the factory in question for the defendant, on commission, is extremely unsatisfactory. It consists solely of the testimony of the plaintiff, on the one hand, and of the manager of the defendant company, Antonio A. Brimo, on the other. From a reading of their testimony we believe that neither of them has been entirely free from prevarications. However, after giving due weight to the finding of the trial court in this regard and after carefully considering the inherent probability or improbability of the testimony of each of said witnesses, we believe we are approximating the truth in finding: (1) That Antonio A. Brimo, in a conversation with the plaintiff, Julio Danon, about the middle of August, 1918, informed the latter that he (Brimo) desired to sell his factory, the Holland American Oil Co., for the sum of P1,200,000; (2) that he agreed and promised to pay to the plaintiff a commission of 5 per cent provided the latter could sell said factory for that amount; and (3) that no definite period of time was fixed within which the plaintiff should effect the sale. It seems that another broker, Sellner, was also negotiating the sale, or trying to find a purchaser for the same property and that the plaintiff was informed of that fact either by Brimo himself or by someone else; at least, it is probable that the plaintiff was aware that he was not alone in the field, and his whole effort was to forestall his competitor by being the first to find a purchaser and effect the sale. Such, we believe, was the contract between the plaintiff and the defendant, upon which the present action is based.

The next question to determine is whether the plaintiff had performed all that was required of him under that contract to entitle him to recover the commission agreed upon. The proof in this regard is no less unsatisfactory. It seems that immediately after having an interview with Mr. Brimo, as above stated, the plaintiff went to see Mr.

Mauro Prieto, president of the Santa Ana Oil Mill, a corporation, and offered to sell to him the defendant's property at P1,200,000. The said corporation was at that time in need of such a factory as the plaintiff was offering for sale, and Mr. Prieto, its president, instructed the manager, Samuel E. Kane, to see Mr. Brimo and ascertain whether he really wanted to sell said factory, and, if so, to get permission from him to inspect the premises. Mr. Kane inspected the factory and, presumably, made a favorable report to Mr. Prieto. The latter asked for an appointment with Mr. Brimo to perfect the negotiation. In the meantime Sellner, the other broker referred to, had found a purchaser for the same property, who ultimately bought it for P1,300,000. For that reason Mr. Prieto, the would be purchaser found by the plaintiff, never came to see Mr. Brimo to perfect the proposed negotiation.

Under the proofs in this case, the most that can be said as to what the plaintiff had accomplished is, that he had found a person who might have bought the defendant's factory if the defendant had not sold it to someone else. The evidence does not show that the Santa Ana Oil Mill had definitely decided to buy the property in question at the fixed price of P1,200,000. The board of directors of said corporation had not resolved to purchase said property; and even if its president could legally make the purchase without previous formal authorization of the board of directors, yet said president does not pretend that he had definitely and formally agreed to buy the factory in question on behalf of his corporation at the price stated. On direct examination he testified for the plaintiff as follows:

"Q.

You say that we were going to accept or that it was beneficial for us; will you say to whom you refer, when you say 'we?'

—

A.

Our company, the Santa Ana Oil Mill.

"Q.

And is that company able to pay the sum of P1,200,000?

—

A.

Yes, sir.

"Q.

And you accepted it at that price of P1,200,000?

—

A.

Surely, because as I already said before, we were in the difficult position of not being able to operate our factory, because of the obstacle placed by the Government.

"Q.

And did you inform Mr. Danon of this acceptance?

—

A.

I did not explain to Mr. Danon."

On cross-examination the same witness testified:

"Q.

What actions did the board of directors of the Santa Ana Oil Mill take in order to acquire or to make an offer to Mr. Brimo of the Holland American Oil Company?

—

A.

But nothing was effected, because Mr. Danon stated that the property had been sold when I was going to deal with him.

"Q.

But do you not say that you made an offer of P1,200,000?

—

A.

No; it was Mr. Danon who made the offer and we were sure to put the deal through because we have bound ourselves"

The plaintiff claims that the reasons why the sale to the Santa Ana Oil Mill was not consummated was because Mr. Brimo refused to sell to a Filipino firm and preferred an American buyer; that upon learning such attitude of the defendant the plaintiff endeavored to procure another purchaser and found a Mr. Leas, who delivered to the plaintiff a letter addressed to Mr. Brimo, offering to buy the factory in question at P1,200,000, the offer being good for twenty-four hours; that said offer was not accepted by Brimo because while he was reading the letter of Leas, Sellner came in, drew Brimo into another room, and then and there closed the deal at P1,300,000. The last statement is admitted by the defendant.

Such are the facts in this case, as nearly accurate as we can gather them from the conflicting evidence before us. Under those facts, is the plaintiff entitled to recover the sum of P60,000, claimed by him as compensation for his services? It will be noted that, according to the plaintiff's own testimony, the defendant agreed and promised to pay him a commission of 5 per cent provided he (the plaintiff) could sell the factory at P1,200,000 ("con tal que V. me venda la fabrica en P1,200,000"). It will also be noted that all that the plaintiff had accomplished by way of performance of his contract was, that he had found a person who might have bought the factory in question had not the defendant sold it to someone else. (Beaumont vs. Prieto, 41 Phil., 670; 249 U. S., 554.)

Under these circumstances it is difficult to see how the plaintiff can recover anything in the premises. The plaintiff's action is not one for damages for breach of contract; it is an action to recover "the reasonable value" of

services rendered. This is unmistakable both from the plaintiff's complaint and his testimony as a witness during the trial.

"Q.

And what is the reasonable value of the services you rendered to Mr. doctrine is, that .. (McGavock Brimo?

—

A.

Five per cent of the price at which it was sold.

"Q.

Upon what do you base your qualification that those services were reasonable?

—

A.

First, because that is the common rate in the city, and, secondly, because of the big gain that he obtained from the sale."

What benefit did the plaintiff, by his "services," bestow upon the defendant to entitle him to recover from the latter the sum of P50,000? It is perfectly clear and undisputed that his "services" did not in any way contribute towards bringing about the sale of the factory in question. He was not "the efficient agent or the procuring1 cause of the sale."

"The broker must be the efficient agent or the procuring cause of the sale. The means employed by him and his efforts must result in the sale. He must find the purchaser, and the sale must proceed from his efforts acting as broker." (Wylie vs. Marine National Bank, 61 N. Y., 415, 416, citing: McClure vs. Paine, 49 N. Y., 561; Lloyd vs. Mathews, 51 id., 124; Lyon vs. Mitchell, 36 id., 235; Briggs vs. Rowe, 4 Keyes, 424; Murray vs. Currie, 7 Carr. & Payne, 584; Wilkinson vs. Martin, 8 id., 5.)

A leading case on the subject is that of Sibbald vs. Bethlehem Iron Co. (83 N. Y., 378; 38 Am. Rep., 441). In that case, after an exhaustive review of various cases, the Court of Appeals of New York stated the rule as follows:

"In all the cases, under all and varying forms of expression, the fundamental and correct doctrine is, that the duty assumed by the broker is to bring the minds of the buyer and seller to an argument for a sale, and the price and terms on which it is to be made, and until that is done his right to commissions does not accrue. (McGavock vs. Woodlief, 20 How., 221; Barnes vs. Roberts, 5 Bosw., 73; Holly vs. Gosling, 3 E. D. Smith, 262; Jacobs vs. Kolff, 2 Hilt., 133; Kock vs. Emmerling, 22 How., 72; Corning vs. Calvert, 2 Hilt., 56; Trundy vs. N. Y. & Hartf. Steamboat Co., 6 Robt., 312; Van Lien vs. Burns, 1 Hilt., 134.)"

* * * * *

"It follows, as a necessary deduction from the established rule, that a broker is never entitled to commissions for unsuccessful efforts. The risk of a failure is wholly his. The reward comes only with his success. That is the plain contract and contemplation of the parties. The broker may devote his time and labor, and expend his money with ever so much/of devotion to the interest of his employer, and yet if he fails, if without effecting an agreement or accomplishing a bargain, he abandons the effort, or his authority is fairly and in good faith terminated, he gains no right to commissions. He loses the labor and effort which was staked upon success.

And in such event it matters not that after his failure, and the termination of his agency, what he has done proves of use and benefit to the principal. In a multitude of cases that must necessarily result. He may have introduced to each other parties who otherwise would have never met; he may have created impressions, which under later and more favorable circumstances naturally lead to and materially assist in the consummation of a sale; he may have planted the very seed from which others reap the harvest; but all that gives him no claim. It was part of his risk that failing himself, not successful in fulfilling his obligation, others might be left to some extent to avail themselves of the fruit of his labors. As was said in *Wylie vs. Marine National Bank* (61 N. Y., 416), in such a case the principal violates no right of the broker by selling to the first party who offers the price asked, and it matters not that sale is to the very party with whom the broker had been negotiating. He failed to find or produce a purchaser upon the terms prescribed in his employment, and the principal was under no obligation to wait longer that he might make further efforts. The failure therefore and its consequences were the risk of the broker only. This however must be taken with one important and necessary limitation. If the efforts of the broker are rendered a failure by the fault of the employer; if capriciously he changes his mind after the purchaser, ready and willing, and consenting to the prescribed terms, is produced; or if the latter declines to complete the contract because of some defect of title in the ownership of the seller, some unremoved incumbrance, some defect which is the fault of the latter, then the broker does not lose his commissions. And that upon the familiar principle that no one can avail himself of the nonperformance of a condition precedent, who has himself occasioned its nonperformance. But this limitation is not even an exception to the general rule affecting the broker's right for it goes on the ground that the broker has done his duty, that he has brought buyer and seller to an agreement, but that the contract is not consummated and fails though the after-fault of the seller. The cases are uniform in this respect. (*Moses vs. Burling*, 31 N. Y., 462; *Glentworth vs. Luther*, 21 Barb., 147; *Van Lien vs. Burns*, 1 Hilt., 134.)

"One other principle applicable to such a contract as existed in the present case needs to be kept in view. Where no time for the continuance of the contract is fixed by its terms either party is at liberty to terminate it at will, subject only to the ordinary requirements of good faith. Usually the broker is entitled to a fair and reasonable opportunity to perform his obligation, subject of course to the right of the seller to sell independently. But having been granted him, the right of the principal to terminate his authority is absolute and unrestricted, except only that he may not do it in bad faith, and as a mere device to escape the payment of the broker's commissions. Thus, if in the midst of negotiations instituted by the broker, and which were plainly and evidently approaching success, the seller should revoke the authority of the broker, with the view of concluding the bargain without his aid, and avoiding the payment of commission about to be earned, it might be well said that the due performance his obligation by the broker was purposely prevented by the principal. But if the latter acts in good faith, not seeking to escape the payment of commissions, but moved fairly by a view of his own interest, he has the absolute right before a bargain is made while negotiations remain unsuccessful, before commissions are earned, to revoke the broker's authority, and the latter cannot thereafter claim compensation for a sale made by the principal, even though it be to a customer with whom the broker unsuccessfully negotiated, and even though, to some extent, the seller might justly be said to have availed himself of the fruits of the broker's labor." (*Ibid.* pp. 444, 445 and 446.)

The rule laid down in the foregoing case was adopted and followed in the, cases of *Zeimer vs. Antisell* (75 Cal. 509), and *Ayres vs. Thomas* (116 Cal., 140).

"The undertaking to procure a purchaser requires of the party so undertaking, not simply to name or introduce a person who may be willing to make any sort of contract in reference to the property, but to produce a party capable, and who ultimately becomes the purchaser." (*Kimberly vs. Henderson and Lupton*, 29 Md., 512, 515, citing: *Keener vs. Harrod & Brooke*, 2 Md. 63; *McGavock vs. Woodlief*, 20 How., 221. See also *Richards, Executor, vs. Jackson*, 31 Md., 250.)

"The defendant sent a poposal to a broker in these words: If you send or cause to be sent to me, by advertisement or otherwise, any party with whom I may see fit and proper to effect a sale or exchange of my real estate, above

described I will pay you the sum of \$200. The broker found a person who proposed to purchase the property, but the sale was not effected. Held: That the broker was not entitled to compensation." (Walker vs. Tirrel, 3 Am. Rep., 352.)

It is clear from the foregoing authorities that, although the present plaintiff could probably have effected the sale of the defendant's factory had not the defendant sold it to someone else, he is not entitled to the commissions agreed upon because he had no intervention whatever in, and much sale in question. It must be borne in mind that no definite period was fixed by the defendant within which the plaintiff might effect the sale of its factory. Nor was the plaintiff given by the defendant the exclusive agency of such sale. Therefore, the plaintiff cannot complain of the defendant's conduct in selling the property through another agent before the plaintiff's efforts were crowned with success. "One who has employed a broker can himself sell the property to a purchaser whom he has procured, without any aid from the broker/" (Hungerford vs. Hicks, 39 Conn., 259; Wylie vs. Marine National Bank, 61 N. Y., 415, 416.)

For the foregoing reasons the judgment appealed from is hereby revoked and the defendant is hereby absolved from all liability under the plaintiff's complaint, with costs in both instances against the plaintiff. So ordered.

Araullo, Street, Avancena, and Villamor, JJ., concur.

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