COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOR THE SECOND APPELLATE DISTRICT

ENTERED Jan 23, 1992 [illegible]
BY Maria E. [illegible] 10-1-90 DEPUTY

DIVISION: 3

FILED
SEP 19 1990
FRANK S. ZOLIN, COUNTY CLERK
[illegible], DEPUTY

OFFICE OF THE COUNTY CLERK
LOS ANGELES COUNTY
111 NORTH HILL STREET
LOS ANGELES, CA. 90012

RE: TOMPKINS, SUSAN
VS.
MANSDORF, LEE
2 CIVIL B040918
LOS ANGELES NO. C529905

* * REMITTITUR * *

I, ROBERT N. WILSON, CLERK OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOR THE SECOND APPELLATE DISTRICT, DO HEREBY CERTIFY THAT THE ATTACHED IS A TRUE AND CORRECT COPY OF THE ORIGINAL ORDER, OPINION OR DECISION ENTERED IN THE ABOVE-ENTITLED CAUSE ON 06/05/90 AND THAT THIS ORDER, OPINION OR DECISION HAS NOW BECOME FINAL.

* * AFFIRMED IN FULL. * *

___APPELLANT _✓_RESPONDENT TO RECOVER COSTS.
___EACH PARTY TO BEAR OWN COSTS.
___COSTS ARE NOT AWARDED IN THIS PROCEEDING.

WITNESS MY HAND AND THE SEAL OF THE COURT AFFIXED AT

OFFICE THIS SEP 12 1990

ROBERT N. WILSON, CLERK

BY: [signature] Maryfarth

DEPUTY

COURT OF APPEAL SECOND APPELLATE DISTRICT STATE OF CALIFORNIA

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

SUSAN TOMPKINS, Plaintiff and Appellant, v. LEE MANSDORF, individually and as trustee, etc., et al., Defendants and Respondents.	2d Civil No. B040918 (Super. Ct. No. C 529905)

APPEAL from a judgment of the Superior Court of Los Angeles County. Richard L. Wells, Judge. Affirmed.

Edward M. Murphy II for Plaintiff and Appellant.

David Brice Toy and Bruce Haber; Rufus von Thulen Rhoades for Defendants and Respondents.

Plaintiff and appellant Susan Tompkins (Tompkins) appeals a judgment following a grant of summary judgment in favor of defendants and respondents Lee Mansdorf (Mansdorf), individually and as trustee for the Mansdorf Family Trust, and the Mansdorf Family Trust. 1/

The issue presented is whether the trial court properly held the purported promissory note executed by Mansdorf in favor of Tompkins for a broker's commission to be a conditional note as a matter of law, and that the conditions rendering the note payable did not occur.

The note is an unconditional instrument in that it did not state the obligation was to be paid "only" out of a particular fund or source, but merely indicated a fund or source from which reimbursement was expected. (Cal. U. Com. Code, § 3105, subds. (1)(f), (2)(b).)

However, while the note was unconditional for purposes of negotiability, it was conditional for purposes of requiring Mansdorf to pay Tompkins the sums due thereunder. The judgment is therefore affirmed. 2/

1/ Although Tompkins's opening brief contends her appeal is timely, it is unnecessary to belabor the point. The trial court signed the judgment on January 23, 1989. Tompkins filed a timely notice of appeal 57 days later, on March 21, 1989. (Rule 2(a), Calif. Rules of Court.)

2/ All statutory references are to the California Uniform Commercial Code, unless otherwise specified.

FACTUAL & PROCEDURAL BACKGROUND

a. The buy/sell transactions.

This is an action by Tompkins, a real estate broker, to recover a commission on a sale of real property which was never consummated due to the buyer's failure to come up with the money to close the transaction.

By way of background in this shady scheme in 1980, Mansdorf was seeking buyers for his two properties, "La Tuna," consisting of approximately 900 acres in Los Angeles County, and "Deer Creek," the property in issue in this action, consisting of approximately 865 acres in Ventura County.

On November 18, 1980, Mansdorf met with Tompkins and a potential buyer, Leon Brukman (Brukman). Brukman presented an offer to purchase all of La Tuna, and a separate offer to purchase an undivided half-interest in Deer Creek.

With respect to La Tuna, Mansdorf apparently agreed to transfer title to the property to Del Rio Development, Inc. (Del Rio), Brukman's corporation, of which Brukman was sole director and chairman of the board, in exchange for Mansdorf receiving 100 percent of Del Rio's stock. Then, Brukman was to buy Del Rio's stock from Mansdorf for $6,250,000. These machinations replaced an outright purchase of the La Tuna real property. Brukman was to take no action as to La Tuna without Mansdorf's express consent.

As for Deer Creek, Mansdorf accepted Brukman's $11 million offer for an undivided half-interest in Deer Creek, and on December 2, 1980, escrow number 15636 was opened at Oak Escrow. Under the terms of the agreement, Brukman was to pay $5.5 million in cash through escrow, which was to close by December 29, 1980. In addition, Brukman was to execute a note in the amount of $5.5 million to be secured by a first trust deed on Deer Creek, with the full principal balance due one year from close of escrow.

On December 30, 1980, the closing date of the Deer Creek escrow was extended to January 15, 1981.

On January 5, 1981, the escrow was amended to provide for a down payment in the form of an assignment to Mansdorf of a $250,000 interest in an all inclusive promissory note secured by a deed of trust on a 28-unit property in Vista. The amendment also provided for Mansdorf to carry back a $10,650,000 note secured by a deed of trust on the property, with a first principal payment of $5,500,000 due 60 days after close of escrow. Further, at the close of escrow, Mansdorf was to deliver to Brukman an unrecorded grant deed to a one-half undivided interest in the property, to be recorded upon the first principal payment of $5.5 million.

On April 20, 1981, Mansdorf learned from a title company employee that Brukman, through Del Rio, had encumbered La Tuna with loans in excess of $3.2 million, which action was taken without Mansdorf's knowledge or consent. Mansdorf confronted Brukman and obtained the return of the unrecorded grant deed to Deer Creek and the cancellation of the Deer Creek escrow.

Irrespective of these maneuvers, Brukman continued to maintain he was in good faith and that he intended to repay the loans and to purchase both La Tuna and Deer Creek. At Brukman's request, Mansdorf gave him an additional 60 days to purchase Deer Creek under a new escrow. The deposit from escrow number 15636 was transferred to new escrow number 15989, which was opened on April 20, 1981. Sixty days passed without performance or tender by Brukman and the Deer Creek escrow terminated on June 20, 1981.

The only payment Mansdorf received from Brukman for Deer Creek was a $100,000 deposit, which Brukman obtained by encumbering La Tuna. Brukman induced Mansdorf to pay $50,000 of that money to Tompkins as an advance commission.

As for La Tuna, Brukman did not pay the loans he had managed to take out on that property, and Brukman and Del Rio filed for Chapter 11. Those portions of the La Tuna property that Brukman encumbered were lost through foreclosure, and Mansdorf received nothing.

b. The instant action. 3/

A Commission Agreement was drafted in connection with the Deer Creek transaction. It was dated December 15, 1980, executed by Mansdorf and Tompkins, and states in relevant

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3/ It would appear Tompkins had to have considerable chutzpah to file this action in the first instance, given its genesis. Even the $100,000 Mansdorf received from Brukman was Mansdorf's own money realized from Brukman's improperly encumbering La Tuna, out of which $100,000 Brukman somehow convinced Mansdorf to give $50,000 to Tompkins as a partial commission!

part: "The total commission is . . . ($550,000.00 . . . payable . . . ($275,000.00 . . . at the close of Escrow. [¶] The balance of . . . $275,000.00) to be paid in the form of a personal Note from Lee Brukman (the BUYER), to be paid Ten Percent . . . of any sales of the subject property [Deer Creek] until paid in full or in any event the total balance will become due and payable no later than Three . . . years after the close of Escrow." (Italics added.)

On January 13, 1981, around the time of the first extension of the Deer Creek escrow, Mansdorf gave Tompkins a promissory note which provided in substance:

Mansdorf promised to pay Tompkins $550,000, noninterest bearing, as follows: $25,000 upon receipt from Brukman to Mansdorf of the first $300,000 payment and 10 percent of all subsequent principal payments from Brukman to Mansdorf to be paid to Tompkins, until the total commission is paid, or 10 percent of all subsequent principal payments until a total cash commission is paid to equal an amount of $300,000, at which time Mansdorf was to assign to Tompkins an all inclusive note and deed of trust on certain real property in Vista which Brukman had assigned to Mansdorf.

On January 11, 1985, Tompkins filed suit against Mansdorf, seeking in the first cause of action to recover on the promissory note the unpaid principal sum of $500,000. In the second cause of action, Tompkins sought to recover $500,000 as the reasonable value of the services she rendered to Mansdorf. Mansdorf answered, denying the allegations and asserted the note was unenforceable due to Tompkins' fraud, failure of consideration and unclean hands.

On March 20, 1985, Mansdorf filed a cross-complaint against Tompkins for conspiracy, fraud and negligent misrepresentation. Tompkins demurred on the ground the cross-complaint was barred by the statute of limitations. On October 21, 1985, Tompkins' demurrer was sustained with 30 days leave to amend. Mansdorf did not file an amended pleading and on August 19, 1988, the trial court granted Tompkins' motion to dismiss the cross-complaint.

On September 30, 1988, Mansdorf filed a motion for summary judgment, supported by his declaration and numerous exhibits. Mansdorf contended the obligation on the promissory note was conditioned upon his receipt of payments from Brukman and that condition never occurred, and further, the common count failed for the same reasons as the first cause of action.

On October 17, 1988, Tompkins also filed a motion for summary judgment and/or summary adjudication of issues. Tompkins submitted it was undisputed that Mansdorf signed, executed and delivered the promissory note, the note was unsecured, she was the holder of the note and the note was unconditional.

The motions were heard on November 7, 1988. The trial court denied Tompkins' motion. The trial court granted Mansdorf's motion for summary judgment, ruling "the terms of the 'Promissory Note' are undisputed; that as a matter of law, the 'Note' is conditional; and that none of the conditions rendering it, or any installment thereof, payable has occurred."

Following entry of judgment, Tompkins appealed.

CONTENTIONS

Tompkins contends the promissory note was unconditional and requests this court to reverse with directions to enter summary judgment in her favor.

DISCUSSION

1. Standard of appellate review.

Mansdorf, as a defendant moving for summary judgment, has the burden of establishing a complete defense or negating each of the plaintiff's theories and thereby establishing the action is without merit. (Tresemer v. Barke (1978) 86 Cal.App.3d 656, 666; Bonus-Built, Inc. v. United Grocers, Ltd. (1982) 136 Cal.App.3d 429, 442.)

Summary judgment is properly granted if all the papers submitted show there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) Because the summary judgment procedure is drastic, it should be used with caution so that it will not become a substitute for a full trial, and doubts as to the merits of the motion are to be resolved in favor of the party opposing the motion. (Becker v. IRM Corp. (1985) 38 Cal.3d 454, 458; Hayman v. Block (1986) 176 Cal.App.3d 629, 639.)

Because the trial court's ruling is one of law based upon the instruments, the appellate court must make its own independent determination of their construction and effect. (Larsen v. Johannes (1970) 7 Cal.App.3d 491, 496; Bonus-Built, Inc. v. United Grocers, Ltd., supra, 136 Cal.App.3d at p. 442; Hayman v. Block, supra, 176 Cal.App.3d at p. 640.)

As we discuss below, while the note was an unconditional instrument for purposes of negotiability because it did not state it was to be paid only out of a particular source or fund, it was conditional for purposes of requiring Mansdorf to make payments to Tompkins.

2. Note was an unconditional instrument only for purposes of Commercial Code.

Section 3105, on which the parties focus, states in relevant part at subdivision (1): "A promise or order otherwise unconditional is not made conditional by the fact that the instrument [¶] (a) Is subject to implied or constructive conditions; or [¶] (b) States its consideration, whether performed or promised, or the transaction which gave rise to the instrument, or that the promise or order is made or the instrument matures in accordance with or 'as per' such transaction; or [¶] . . . . [¶] (f) <u>Indicates a particular account to be debited or any other fund or source from which reimbursement is expected</u>; or [¶] (g) Is limited to payment out of a particular fund or the proceeds of a particular source, if the instrument is issued by a government or governmental agency or unit; or [¶] (h) Is limited to payment out of the entire assets of a partnership, unincorporated association, trust or estate by or on behalf of which the instrument is issued." (Italics added.)

Subdivision (2) of the statute states: "A promise or order is not unconditional if the instrument ¶ (a) States that it is subject to or governed by any other agreement; or ¶ (b) States that it is to be paid <u>only out of a particular fund or source</u> except as provided in this section." 4/ (§ 3105, subd. (b), italics added.)

To sum up, an instrument is not made conditional by the mere fact it indicates a particular fund or source from which payment is expected. (§ 3105, subd. (1)(f).) However, if an instrument directs payment to be made <u>only</u> out of a particular source or fund, such limitation renders the promise to pay conditional in nature. (§ 3105, subd. (2)(b).)

4/ The reference in subdivision (2)(b) to "except as provided in this section" is to subdivisions (1)(g) and (1)(h). (Cal. Code Comment, 23B West's Ann. Cal. U. Com. Code (1964 ed.) p. 36.) Those subdivisions are plainly inapplicable.

Here, the promissory note did not direct payment to be made _only_ out of Brukman's payments to Mansdorf. (§ 3105, subd. (2)(b.) Rather, the instrument merely indicated the source or fund from which Tompkins could expect reimbursement, and it reflected that Mansdorf's promise to Tompkins would mature in accordance with Brukman's performance to Mansdorf. (§ 3105, subds. (1)(b), (1)(f).)

However, while the note was an unconditional instrument within the meaning of the Commercial Code, its unconditionality in that regard is irrelevant as between Tompkins and Mansdorf.

b. _Unconditionality of note irrelevant as between Mansdorf and Tompkins_.

Section 3104, which sets forth the requisites for _negotiability_, states in relevant part: "(1) Any writing _to be a negotiable instrument_ within this division must [¶] (a) Be signed by the maker or drawer; and [¶] (b) _Contain an unconditional promise_ or order to pay a sum certain in money . . . ; and [¶] (c) Be payable on demand or at a definite time; and [¶] (d) Be payable to order or to bearer." (Italics added.)

The Uniform Commercial Code Comment following section 3105 states the statute "is intended to make it clear that, _so far as negotiability is affected, the conditional or unconditional character of the promise_ or order is to be determined by what is expressed in the instrument itself; and to permit certain specific limitations upon the terms of payment." (23B West's Ann. Cal. U. Com. Code (1964 ed.) pp. 36-37.)

Here, as discussed above, the language of the instrument establishes the note is unconditional for purposes of negotiability, because the note did not expressly limit payment to a particular fund, but merely indicated the expected source of reimbursement. However, because the sole parties to this dispute are Mansdorf and Tompkins, the maker and the payee, we are not concerned with the note's negotiability. The purported note's unconditional character, which is relevant to its negotiability, does not entitle Tompkins to recover a broker's commission from Mansdorf without due regard to whether Brukman rendered any principal payments to Mansdorf.

3. Mansdorf's making payment to Tompkins conditioned upon Mansdorf's receipt of principal payments from Brukman, which condition did not occur.

a. General principles.

The applicable principles are summarized in Cochran v. Ellsworth (1954) 126 Cal.App.2d 429.

"Generally speaking, a real estate broker has earned his commission when he has brought to the vendor a purchaser who is ready, willing and able to buy the property upon the terms on which the agent is authorized to sell, or when a written contract upon any terms acceptable to the seller has been entered into with a purchaser originally brought to the vendor by the agent. [Citation.] It is not necessary for the sale to be completed, under the foregoing rule, for the broker to be entitled to his commission. [Citation.] . . . A broker who has rendered all required services is not to be denied compensation therefor by the whims of a defaulting vendor or purchaser who arbitrarily refuses to perform under a sales contract." (Cochran, supra, 126 Cal.App.2d at p. 438.)

However, the right to compensation may be conditioned on some event. "An owner and broker may, if they wish, enter into a binding agreement that no commission shall be considered earned until the happening of a certain specified event [citation], or upon certain defined terms and conditions [citation] . . . ." (Cochran, supra, at p. 439; 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 736, p. 667.)

In Cochran, the brokerage contract provided "'in the event of consummation of the sale' a commission was to be paid, the first payment to be 'at the close of escrow.'" (Cochran, supra, 126 Cal.App.2d at p. 439.) The event upon which the first payment was conditioned never occurred as the escrow did not close. (Ibid.) In holding the owner was not liable to the broker, Cochran stated: "Where a broker has seen fit to allow payment of his compensation to be contingent upon performance of a contract between parties other than himself, he cannot complain if, through the nonperformance of that contract, his own contingent rights be lost." (Id., at p. 440.)

b. <u>Application here</u>.

As set forth above, the promissory note Mansdorf gave Tompkins provided in substance:

Mansdorf promised to pay Tompkins $550,000, noninterest bearing, as follows: $25,000 <u>upon receipt from Leon Brukman to Mansdorf</u> of the first $300,000 payment and 10 percent of all subsequent principal payments from Brukman to Mansdorf to be paid to Tompkins, until the total commission is paid, or 10 percent of all subsequent principal payments until a total cash commission is paid to equal an amount of $300,000, at which time Mansdorf was to assign to Tompkins an all-inclusive note and deed of trust on certain real property in Vista which Brukman had assigned to Mansdorf.

Tompkins does not dispute that Brukman failed to make the required principal payments. 5/ Further, Tompkins agreed

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5/ Tompkins's opening brief, without reference to the record, states in early January 1981, the Deer Creek escrow closed, a one-half interest in the property was conveyed, and she received the note for the commission. This statement is consistent with her declaration in opposition to Mansdorf's motion for summary judgment.

Tompkins's assertion the Deer Creek escrow was consummated flies in the face of the record. The exhibits in the clerk's transcript disclose that Mansdorf and Brukman signed cancellation instructions on the Deer Creek escrow on April 20, 1981. Further, on the same day they entered into another 60-day escrow on the property. According to Mansdorf's declaration, Brukman failed to perform and the latter Deer Creek escrow terminated on June 20, 1981.

to allow Mansdorf's obligation to pay the sums due under the note to be linked to Brukman's performance. Brukman's rendering payment to Mansdorf did not merely designate the time for Mansdorf to remit payment to Tompkins, but was a condition precedent to Mansdorf's making the payments called for by the note.

Because the condition of Brukman's rendering payment to Mansdorf was not met, the trial court properly granted summary judgment for Mansdorf on Tompkins's effort to recover the sum claimed on the note.

CONCLUSION

Because the note did not indicate it was to be paid <u>only</u> out of a particular fund or source, it was an unconditional instrument within the meaning of the Commercial Code. (§ 3105, subd. (2)(b).) However, the note's status as an unconditional instrument is relevant only to its negotiability (§ 3104, subd. (1)(b); see U. Com. Code Comment, 23B West's Ann. Cal. U. Com. Code (1964 ed.) pp. 36-37), which is not an issue here. Because Mansdorf's payment of the sums due under the note was conditional upon his receipt of certain principal payments from Brukman, which events did not occur, summary judgment in favor of Mansdorf was proper.

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DISPOSITION

The judgment is affirmed. Mansdorf to recover costs on appeal.

NOT TO BE PUBLISHED

KLEIN, P.J.

We concur:

DANIELSON, J.

POUNDERS, J.*

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*Assigned by the Chairperson of the Judicial Council.