MISSOURI REAL ESTATE COMMISSION ACT;

Broker violates the Act by concealing the fact that property is restricted and need not make the misrepresentation.

June 12, 1942

6-17

FILE

Missouri Real Estate Commission
Jefferson City, Missouri

Attention - Mr. J. W. Hobbs, Secretary.

Gentlemen:

We are in receipt of your request for an opinion, under date of June 8, 1942, in which you set out three questions in regard to the violation of the Missouri Real Estate Commission Act.

The law applicable to the three questions contained in your request, is Section 10, paragraphs (a) and (g) of the Missouri Real Estate Commission Act, Laws of Missouri, 1941, page 428, - this partial section reads as follows:

> "(a) Making substantial misrepresentations or false promises in the conduct of his business, or through agents or salesmen or advertising, which are intended to influence, persuade or induce others."
>
> "(g) Any other conduct which constitutes untrustworthy or improper, fraudulent or dishonest dealings, or demonstrates bad faith or gross incompetence."

Your first question reads as follows:

"1. If an owner of a restricted property solicits the services of a Negro real estate broker to sell such property to a Negro family for their occupancy, and a sale is consummated, there is no cause for action by the Commission unless it establishes as a fact that the broker represented the property to the buyer as being unrestricted, as a result of which the buyer suffered financial loss."

In this question you ask whether or not it is necessary for the broker to actually make a false representation to the buyer that the property is unrestricted. Fraud consists of two acts - one, actual fraud and acting fraud, and, second, passive fraud. Under this question if the broker knew that the property was restricted from sale to negross even though he did not represent that it was unrestricted he would be violating paragraph (g) of Section 10, supra.

In the case of Schrabauer v. Schneider Engraving Product, 25 S. W. (2d) 529, l. c. 533, Par. 7, the court, in defining "fraud", said:

"Now fraud may manifest itself in devious ways. It comprises all acts, omissions, and concealments involving a breach of legal or equitable duty, and resulting in damage to another. It may be either active or passive; and while it is true that ordinarily a distinction is to be drawn between mere silence and active concealment, yet mere silence

> alone will be held to be a fraud where the circumstances are such as to impose a duty upon one to speak, and he deliberately remains silent. 26 C. J. 1071."

Under the above holding, if the real estate agent, or broker, concealed the fact that the property was restricted from sale to negroes, even though he did not represent the property as being unrestricted, he, nevertheless, is guilty of fraud.

Your second question reads as follows:

> "2. If a broker seeks the listing for sale of a restricted property, representing to the owner that owners of neighboring properties intend to make sales of their holdings to Negroes, thereby changing the residential character of the block or neighborhood, which would shortly result in vitiating the entire effect of the restrictions in the neighborhood or block, the Commission might take action but only if the representations with respect to the other property holders were false."

The mere listing for sale of restricted property is not a violation of the Missouri Real Estate Commission Act, even though, at the time of the listing the agent, or broker, informed the owner of the restricted property that

he intended to sell the property to negroes. The mere listing is not the sale; but, if the said agent, or broker, falsely represented to the owner of the property that all other owners intended to sell to negroes, then he would be violating Par. (a) of Section 10, supra. In order to make a valid sale to a negro, of property, the sale of which was restricted from negroes, it would be necessary that all owners of fee in the restricted neighborhood join in a waiver of the restriction. If the agent, or broker, falsely misrepresented the facts, he is guilty of violating the Missouri Real Estate Commission Act.

"False pretenses" has been defined in the case of State v. Houchins, 46 S. W. (2d) 891, l. c. 894, where the court said:

> "In State v. De Lay, 93 Mo. 98, 5 S. W. 607, loc. cit. 609, 'pretense' is thus defined: 'The word "pretense" when used in a criminal statute is to be understood in its legal and technical sense, it having a well-defined as well as a peculiar and appropriate meaning in law. Rev. St. 1879, Sec. 3126. Its definition is thus given by Mr. Bishop: "A false pretense is such a fraudulent representation of an existing or past fact, by one who knows it not to be true, as is adapted to induce the person to whom it is made to part with something of value." 2 Bish. Crim. Law, Sec. 415.'"

Your third question reads as follows:

> "The Commission need not wait until a majority of owners in

> the restricted area bring injunction or other proceedings to stay the completion of a sale in violation of a restriction. In most covenants of restriction there is a provision that gives a single property owner the right to bring such an action on his own behalf and for the benefit of others who personally joined in the restrictive covenants. The Commission might initiate action against a licensee either on the filing of such an injunction and before the case is decided by the courts, or may take such action as the circumstances warrant, even though no injunction is ever filed."

It is not necessary that the covenant of restriction give a single property owner the right to bring an injunction where the restriction has been violated, for the reason that he has an easement over all of the restricted area with the right to bring an injunction, whether authorized by the restriction or not.

In the case of Porter et al v. Johnson et al., 115 S. W. (2d) 529, l. c. 534, the court, in stating that rule said:

> "'If no radical change in the condition and use of the restricted property occurs, the circumstances that there have been changes in the territory <u>surrounding</u> the covenanted area will not of itself be sufficient

to destroy the restrictions. Pierce v. St. Louis Union Trust Company, supra, 311 Mo. (262), loc. cit. 295, et seq., 278 S. W. (398), loc. cit. 408.' Rombauer v. Christian Church, 328 Mo. 1, loc. cit. 18, 40 S. W. 2d 545, 553. The fact that changed conditions render the restriction less valuable will not prevent their enforcement if the restrictions remain of substantial value. Rombauer v. Christian Church, supra. Nor will courts refuse to enforce restrictions even if the property be of more monetary value with restrictions removed. There are some rights more valuable than money. Noel v. Hill, 158 Mo. App. 426, loc. cit. 450, 138 S. W. 364. We do not agree with the contention of defendants that since Negroes live on property abutting this area on the rear, and live one-half block in front, facing another street, and that since vacant property across the street is offered for sale to Negroes for residential purposes, the restrictions are without value to plaintiffs. The vacant property across the street is not likely to be built up with Negro tenanted houses for many years to come, in view of the record of such building during the past 15 years. The same may be said of speculation as to future building on and occupancy of the corner lot adjoining the district on the south, it now being vacant. The one Negro occupied house on the north was so occupied before the area was re-

stricted, consequently its occupancy has not changed conditions at all.

"In the Rombauer Case, supra, the Supreme Court said that the defense of changed conditions is an affirmative defense, and that he who asserts it must prove three things, to wit: '(1) The radical change in condition; (2) that as a result enforcement of the restrictions will work undue hardship on him; (3) and will be of no substantial benefit to the plaintiff.' Argument as to whether or not Negroes may occupy property outside the district at some speculative future date does not tend to prove a present changed condition; nor does speculation as to what may occur in the next block south of the area, and outside of it, prove, or tend to prove, the ultimate facts. This case is not similar to one involving restrictions against business encroachment where the district thereafter becomes surrounded with industrial buildings on the outside, the smoke and fumes of which render the district wholly undesirable from a residential standpoint. Such a changed condition as that gives reason for an exception to the rule declared in Pierce v. St. Louis Union Trust Company, supra; but such is not this case. The evidence here fails to establish that conditions have so changed as to render the restrictions of no substantial value to plaintiffs."

Also, in the case of State v. Mulloy, 61 S. W. (2d) 741, l. c. 743, the court said:

> "The plaintiffs in the injunction suit (relators here) are owners of lots in University Heights subdivision. The defendant school district was proceeding to erect and use buildings and grounds in such subdivision for school purposes in violation of valid building restrictions excluding and prohibiting such use. It is the settled law of this state that where the deeds of conveyance impose valid restrictions on the lots within a given area, then each lot and the owner of same has an easement in each and all the other lots affected by the restrictions, which easement is a property right to be protected by injunction, at the owner's instance, restraining and preventing violations of the building restrictions. Such building restrictions and the rights arising therefrom are subordinate to the right of eminent domain and can be extinguished by condemnation proceedings. * * "

CONCLUSION

In view of the above authorities, it is the opinion of this department that if an agent, or broker, conceals the fact that the property is restricted from sale to negroes, although he does not represent to the buyer of

the property that it is unrestricted, he, nevertheless has committed a fraud upon the buyer of the property.

It is further the opinion of this department that if a broker merely lists restricted property for sale to negroes and informs the owner of the property that it is his intention to sell to negroes he has not violated the Missouri Real Estate Commission Act until he has actually sold the restricted property to a negro. If he falsely represents that the other property owners intend to sell their property to negroes, he is guilty of violating the Act.

It is further the opinion of this department that the Commission need not wait until an injunction suit is brought to enforce the restrictions in the neighborhood before they could revoke the license of the broker, or salesman, who has violated the act by making the sale, knowing at the time that the property was restricted from the sale to negroes. The Commission might initiate action against a licensee at any time before the filing of such an injunction and need not wait until a suit is filed or judgment is had.

Respectfully submitted

APPROVED:

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