

REAL ESTATE COMMISSION: To collect commission licensee must have license at the time he was employed to sell real estate.

April 26, 1943



Mr. J. W. Hobbs
Secretary
Missouri Real Estate Commission
Jefferson City, Missouri

Dear Sir:

We are in receipt of your letter of April 21, 1943, in which you request an opinion as follows:

"This question has been put to the Commission. Will you give us your opinion on it?"

"Does the obtaining of a license 10 days or two weeks after a sale is made entitle the plaintiff to maintain a suit in court for a commission? The particular plaintiff in question did not take out a license in 1942 and about two weeks after the sale was made he applied and was issued a license in 1943."

We are assuming that the plaintiff who has filed his suit, as set out in your request, either seeks to recover on an implied or express contract for his commission as a licensee.

Section 16 of the Missouri Real Estate Commission Act, Laws of Missouri, 1941, page 431, reads as follows:

"No person, copartnership, corporation or association engaged within this state in the business or acting in the capacity of a real estate broker or real estate salesman shall bring or maintain an action in any court in this state for the

recovery of compensation for services rendered in the buying, selling, exchanging, leasing, renting or negotiating a loan upon any real estate without alleging and proving that such person, copartnership, corporation, or association was a licensed real estate broker or salesman at the time when the alleged cause of action arose."

This section specifically states:

" * * * * without alleging and proving that such person, copartnership, corporation, or association was a licensed real estate broker or salesman at the time when the alleged cause of action arose."

In your request you state that he was not a licensee until two weeks after the sale was made, which may mean that the contract for commission was entered into previous to the time of the sale.

The authority to pass laws is vested in the legislature under Section 1, Article IV of the Constitution of Missouri, so long as it is not restrained under Section 53, Article IV of the Constitution. Section 1 of Article IV of the Constitution of Missouri reads as follows:

"The legislative power, subject to the limitations herein contained, shall be vested in a Senate and House of Representatives, to be styled 'The General Assembly of the State of Missouri.'"

Section 16 of the Missouri Real Estate Act, supra, is not a violation of Section 53, Article IV of the Constitution of Missouri, which prohibits the enactment of special laws, and is not restricted or prohibited by any other section of the Constitution of Missouri.

In construing a statute the court should consider the intent and the purpose of the act, as enacted by the legislature. (Artophone Corp. v. Coale, 133 S. W. (2d) 343, 345

Mo. 344 and State ex rel McKittrick v. Carolene Products Co., 144 S. W. (2d) 153, 346 Mo. 1049.)

The Real Estate Act as enacted by the legislature shows the intent and purpose of the legislature to grant licenses to persons who can qualify under that section and are competent to transact business in such a manner so as to safeguard the interests of persons who they represent. Section 7 of the Missouri Real Estate Commission Act, Laws of Missouri, 1941, page 427, reads as follows:

"A license shall be granted only to persons who bear, and to corporations or associations whose officers bear, a good reputation for honesty, integrity, fair dealing, and who are competent to transact the business of a real estate broker or a real estate salesman in such manner as to safeguard the interests of persons whom they represent."

Under Section 16, supra, the cause of action can only be sustained when the petition alleges, and it is proven that the plaintiff was a licensee at the time the cause of action arose. Under the facts in your request the plaintiff was not a licensee until about two weeks after the sale, and probably longer after the contract of employment for the commission was made.

At the time the implied or express contract was made for the payment of a commission he was not a licensee and such contract was void as being in violation of the statute, that is Section 16, supra.

We are presuming that the plaintiff impliedly represented himself as a licensee and in such a case the contract for commission was void, and is unenforceable. It was so held in the case of Clair v. American Bankers Ins. Co., 137 S. W. (2d) 969, pars. 1-3, where the court said:

" * * * The so-called sales and assumption agreement was not enforceable against either party to it for the reason it was not effective until approved, as required by section 5731, supra. The law will not

uphold a contract made in contravention of statutory provisions. Saunders v. Union Central Life Ins. Co., 212 Mo. App. 186, 253 S. W. 177; Gooch v. Metropolitan Life Ins. Co., 333 Mo. 191, 61 S. W. 2d 704; Miller v. Bowen Coal & Mining Co., Mo. App., 40 S. W. 2d 485."

Also, in the case of Northcutt v. McKibben, 159 S. W. (2d) 699, pars. 7-10, the court said:

" * * * The law will not uphold a contract made in contravention of statutory provisions. * * * * *"

In the case of Massie v. Cottonwood School District, No. 36, of Nodaway County, (Kansas City Court of Appeals), 70 S. W. (2d) 1108, par. 1, the court said:

"The action being for damages because of an alleged breach of a claimed contract, of course the proof must establish a legal, enforceable contract. * *"

If the plaintiff in this action described in your request claimed and made representations to the defendant that he was a licensed real estate agent, when in truth and fact he was not licensed at the time he entered into a contract for the commission he has committed a fraud, and the contract would be unenforceable. It was so held in the case of Taggart v. School Dist. No. 52, Carroll County, 96 S. W. (2d) 335, par. 3-4, where the court said:

" * * * In the early case of Armstrong v. Winfrey, 61 Mo. 354, 359, this court said: 'It is a familiar doctrine that no valid contract can arise out of a fraud, and that any action brought upon a supposed contract which is shown to have arisen from fraud, may be successfully resisted. Fraud avoids all contracts, where it can be shown that if it had not been employed the contract would not have been made.' It

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is clear that plaintiff's written contractual representation that she was not married was a fraud upon defendant and of such a nature as to affect defendant's willingness to contract with plaintiff. Courts should not and do not aid fraud-feasors by enforcing contractual obligations procured by means of fraudulent representations. See Guilford School Township v. Roberts, 28 Ind. App. 355, 62 N. E. 711; Security Sav. Bank v. Kellems, supra."

CONCLUSION

It is, therefore, the opinion of this department that the obtaining of a license ten days or two weeks after a sale of real estate is made will not entitle the plaintiff to maintain a suit in court for his commission agreed upon with the defendant who was the owner of the real estate.

It is further the opinion of this department that in order for the plaintiff to recover compensation for services rendered in the sale of real estate he must allege in his petition, and prove, that he was a licensed real estate broker or salesman at the time the alleged cause of action arose.

Respectfully submitted

APPROVED BY:

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