

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

RICK MARTIN,

Plaintiff and Respondent,

v.

JOSEPH AVIGDOR, et al.,

Defendants and Appellants.

G040399

(Super. Ct. No. 07CC03513)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, David R. Chaffee, Judge. Reversed.

Jeffrey Lewis for Defendants and Appellants.

Payne & Fears and Daniel L. Rasmussen for Plaintiff and Respondent.

\* \* \*

Joseph and Mary Avigdor were the buyers in a real estate transaction that failed due to their conduct. They appeal from the judgment requiring them to pay Rick

Martin, the broker employed by the sellers, the commission he would have earned had the sale gone through. We reverse.

## FACTS

The relevant facts from which this appeal arises are undisputed. Rick Martin, a real estate broker, entered into a listing agreement with David and Denise Sibell and Paul and Dorothy Belli (Sellers) to sell their real property located at 416 Acacia in Corona del Mar for a six percent commission. Sellers subsequently accepted an offer from Joseph and Mary Avigdor (Buyers) for \$2,300,000.

On March 30, 2006, the Buyers and Sellers executed a standardized California Association of Realtors form entitled “Residential Purchase Agreement and Joint Escrow Instructions” (the Contract). The Contract provides that Martin is the exclusive agent of the Sellers and First Team Estates is the exclusive agent of the Buyers. The contract contains two paragraphs referencing broker compensation: “29. **BROKER COMPENSATION FROM BUYER:** If applicable, upon Close Of Escrow, Buyer agrees to pay compensation to Broker as specified in a separate written agreement between Buyer and Broker. . . . ¶ . . . 32. **BROKER COMPENSATION FROM SELLER:** ¶ A. Upon Close Of Escrow, Seller agrees to pay compensation to Broker as specified in a separate written agreement between Seller and Broker. ¶ B. If escrow does not close, compensation is payable as specified in that separate written agreement.” There was no separate written agreement between the Buyers and Martin. The listing agreement was the only separate written agreement between the Sellers and Martin; it provides “[i]f completion of the sale is prevented by a party to the transaction other than Seller, then compensation due [the broker] shall be payable only if and when Seller collects damages by suit, arbitration, settlement, or otherwise . . . .”

In a section entitled “JOINT ESCROW INSTRUCTIONS TO ESCROW HOLDER,” the Contract specifies that the brokers are parties to the escrow “for the sole purpose of compensation pursuant to paragraphs 29, 32A and paragraph D of the section

titled Real Estate Brokers on page 8. Buyer and Seller irrevocably assign to Brokers compensation specified in paragraphs 29 and 32A, respectively, and irrevocably instruct Escrow Holder to disburse those funds to Brokers at Close Of Escrow . . . .”

On page eight of the Contract, after the signatures of the Buyers and the Sellers, there is a boxed area entitled “REAL ESTATE BROKERS.” Paragraph A in the box specifies that “Real Estate Brokers are not parties to the Agreement between Buyer and Seller.” Paragraph D in the box provides: “COOPERATING BROKER COMPENSATION: Listing Broker agrees to pay Cooperating Broker (Selling Firm) and Cooperating Broker agrees to accept, out of Listing Broker’s proceeds in escrow, . . . the amount specified in the M[ultiple] L[isting] S[ervice] . . . .”

Under “OTHER TERMS AND CONDITIONS,” in paragraph 25D, there is the following handwritten language: “The commission for Firsteam [*sic*] Estate to be \$40,000 – and \$30,000 to Rick Martin.” Martin testified he would have received a commission of \$138,000 under the listing agreement, which he then would have split with the Buyers’ broker. But “[w]hen [the Buyers’ broker] presented the offer, I explained to her that [the Sellers] had a particular amount of money in this particular project in the form of their original purchase price and their cost of renovation and that in order for them to realize any profit, . . . there had to be a reduced sales commission, or it wouldn’t work for the sellers.” The two brokers agreed to “reduce commissions so that the sellers would agree to that particular rock-bottom price.” Martin negotiated the “[\$]30,000/\$40,000 split” with “all of the sellers.”

Subsequently, the Buyers failed to timely complete the purchase notwithstanding that the Sellers fully performed their obligations under the terms of the Contract. The listing agreement between the Sellers and Martin expired by its own terms, and the Sellers, citing a loss of confidence in Martin’s ability to sell the Property, hired a new broker. They subsequently sold the Property for \$2,325,000. Martin received no commission or compensation of any kind.

Martin filed a complaint against the Buyers, claiming he was a third party beneficiary of the Contract which was breached by the Buyers. Alternatively, he claimed damages as a result of the Buyers' intentional interference with his contract with the Sellers. Following a bench trial, the trial court found that Paragraph 25D manifested an intent on the part of the Buyers and the Sellers to pay Martin a commission and therefore Martin was a third party beneficiary of the Contract. "[I]t appears to me that what we have essentially is a promise by both the seller and the buyer to compensate the brokers; [\$]40,000 to the buyers' broker, [\$]30,000 to the sellers' broker. It's a specified amount. [¶] And it appears that essentially the parties in so agreeing in a real sense . . . put Mr. Martin in this position of being entitled to claim a third party beneficiary right to enforce the contract. He did everything, I think, that was required of him and probably more, in trying to close this deal." The trial court awarded Martin \$30,000 plus attorney fees of \$21,449.25 pursuant to the attorney fee clause in the Contract.

#### DISCUSSION

The Buyers appeal, claiming the trial court erred in concluding that Martin was a third party beneficiary to the Contract and therefore could recover his commission from them. We agree.

Generally, whether a person is an intended third party beneficiary of a contract is a question of fact reviewed under the substantial evidence standard. (*Prouty v. Gores Technology Group* (2004) 121 Cal.App.4th 1225, 1233.) But "where . . . the issue [of whether a third person is an intended beneficiary] can be answered by interpreting the contract as a whole and doing so in light of the uncontradicted evidence of the circumstances and negotiations of the parties in making the contract, the issue becomes one of law that we resolve independently." (*Ibid.*)

In this case, whether the trial court was correct in concluding that Martin was a third party beneficiary to the Contract can be determined either from the contents of the Contract taken as a whole or the provisions of the contract interpreted in light of undisputed extrinsic evidence. Hence, we review the trial court's conclusion that Martin was an intended third party beneficiary of the Contract under a de novo standard.

The theory of a third party beneficiary is codified in Civil Code section 1559: "A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it." "The test for determining whether a contract was made for the benefit of a third person is whether an intent to benefit a third person appears from the terms of the contract. [Citation.] If the terms of the contract necessarily require the promisor to confer a benefit on a third person, then the contract, and hence the parties thereto, contemplate a benefit to the third person." [Citation.]" (*Prouty v. Gores Technology Group, supra*, 121 Cal.App.4th at p. 1232.)

The benefit of the contract to the third person must not be remote or incidental to be enforceable by him; rather, the contract must be expressly for his benefit. (1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 689, p. 776.) "The circumstance that a literal contract interpretation would result in a benefit to the third party is not enough to entitle that party to demand enforcement. The contracting parties must have intended to confer a benefit on the third party. [Citations.]" (*Neverkovec v. Fredericks* (1999) 74 Cal.App.4th 337, 348.) But it is not necessary that both parties to the contract intend to benefit the third party. "Insofar as intent to benefit a third person is important in determining his right to bring an action under a contract, it is sufficient that the promisor [here, the Avigdors] must have understood that the promisee [here, the Sellers] had such intent. [Citations.] No specific manifestation by the promisor of an

intent to benefit the third person is required.” (*Lucas v. Hamm* (1961) 56 Cal.2d 583, 591.)

Before paragraph 25D, the handwritten paragraph providing for a reduced commission, was added to the Contract, there is no reasonable basis on which to conclude that Martin was a third party beneficiary. The Contract and the Listing Agreement clearly provided that Martin was the Sellers’ exclusive agent and his commission was to be paid by the Sellers. The portion of the Contract that gives instructions to the escrow holder provides that Martin’s commission would be in the amount specified by the multiple listing service and be split with the Buyers’ broker. Martin was not a party to the Contract. While Martin would surely have benefitted from the Buyers’ performance, there is nothing to indicate that either the Buyers or the Sellers entered into the Contract with the intent to benefit him. Martin’s benefit would have been incidental to the Buyers’ completed performance.

Our conclusion is supported by *Steinberg v. Buchman* (1946) 73 Cal.App.2d 605, where the plaintiff-broker, the exclusive agent of the seller, sought to recover his commission from the defendant-buyer who had breached his agreement to purchase real property. In rejecting the broker’s third party beneficiary theory, the court stated: “No agreement was made expressly or at all for the benefit of plaintiff. It appears from what we have said that defendant deposited his money in escrow with instructions to pay it to [the seller]; that was the extent of his agreement and of his responsibility. In other words, he made no agreement with anyone for the payment of plaintiff’s commission. Certainly there was nothing in the agreement of purchase which would indicate that defendant agreed to purchase the property expressly or at all for the benefit of plaintiff. It is not enough for plaintiff to show that he would incidentally have been benefited by performance. He was required to prove a contract which was made

expressly for his benefit and one in which it clearly appeared that he was the beneficiary. [Citations.] In this he failed completely.” (*Id.* at p. 609.)

In reaching the conclusion that Martin was a third party beneficiary of the Contract, the trial court found the addition of paragraph 25D altered the obligations of the Buyers and Sellers with respect to their brokers’ compensation and required the Buyers to pay a commission to the Sellers’ broker even if the sale did not close. We cannot agree. Read in light of the entire Contract, and considering the undisputed evidence given at trial, we believe that paragraph 25D was not intended to make Martin a third party beneficiary, where he was not so before. It appears that Paragraph 25D was added merely to reduce the amount of the commissions the brokers were to be paid through escrow at the close of sale. This intent is manifested from Martin’s testimony that the reduced commission amounts in paragraph 25D were added “to facilitate the sale” at a “rock-bottom” price. There is nothing in the record to suggest the parties intended to confer a benefit on Martin by the addition of the paragraph.

As the trial court acknowledged, there is no case law supporting the conclusion that a broker, who is the exclusive agent of the seller, can recover from the buyer, with whom he has had no prior relationship, merely because the agreement between the buyer and seller contains a provision which states the dollar amount of the broker’s commission. After rejecting the plaintiff’s third party beneficiary theory in *Steinberg v. Buchman, supra*, 73 Cal.App.2d 605, the court found the plaintiff could not recover from the buyer because he had been employed only by the seller. The court stated, “The case is governed by another rule, which is that a broker who is employed by and acts for only one of the parties to a transaction, and who is unable to collect a commission from his principal because of the failure of the other contracting party to complete the transaction, cannot recover damages from the latter, with whom he has no contract.” (*Id.* at p. 610.) This rule was reaffirmed in *Hunter v. Vernon* (1948) 85 Cal.App.2d 525, where the court of appeal held the plaintiff-broker could not recover

against the defendant-buyer who had not hired the plaintiff or promised to pay him. (*Id.* at p. 528.)

Some cases have loosely used third party beneficiary language when allowing a broker to recover a commission from the breaching party to a real estate purchase contract; upon examination, however, the decisions appear to be based on the defendant's implied promise to complete the purchase transaction. Under an implied promise legal theory, the crucial question is whether the defendant hired the broker as his agent and thereby implicitly promised to complete the transaction, which the broker put his effort into securing, to ensure that the broker would get his commission. (*Super 7 Motel Associates v. Wang* (1993) 16 Cal.App.4th 541, 547.)

For example, the court in *Donnellan v. Rocks* (1972) 22 Cal.App.3d 925, held a broker could recover his commission from the breaching party to a real estate contract as a third party beneficiary, but its reasoning was based on the defendants' implied promise to pay the commission. In *Donnellan*, the defendants hired the broker to list their property for sale or trade. The broker "spent considerable time and effort . . . expending funds for advertisements and showing [defendants'] property . . . ." (*Id.* at pp. 927-928.) Subsequently, the defendants made an offer to purchase the Banks property, which the broker found for them, and designated their property in trade as a down payment. The Banks rejected the trade and demanded that the defendants take over their existing loan. The defendants agreed, and they, the broker, and the Banks signed a deposit receipt in which the Banks agreed to pay a six percent commission to the broker. When escrow was completed and ready to close, the defendants refused to go through with the transaction for "personal reasons." The broker sued the defendants for his commission.

The *Donnellan* court, citing out-of-state law, held the broker could recover his commission from the defendants. Although the court said the broker was a third party beneficiary, its reasoning was based on the defendants' implied promise to pay the



commission: “[W]hen a prospective buyer solicits a broker to find or to show him property and the broker finds property satisfactory to the buyer which the owner agrees to sell at the price offered, and the buyer knows that the broker will earn a commission from the owner, the law will imply a promise on the part of the buyer to complete the transaction with the owner. If he fails or refuses to do so without a valid reason and thus prevents the broker from earning the commission from the seller, he becomes liable to the broker for breach of the implied promise.” (*Donnellan v. Rocks, supra*, 22 Cal.App.3d at p. 931.) The court distinguished *Steinberg* and *Hunter* on the grounds that “here the broker was retained originally by, and performed services for, the buyers.” (*Ibid.*)

Martin cites *Herman v. Savage* (1936) 17 Cal.App.2d 238 in support of his position that the Buyers are liable for his commission even if he is not a third party beneficiary of the Contract. In *Herman*, the court affirmed an order granting a new trial after a verdict denying the broker’s recovery of a commission. The defendant was a party to an agreement to exchange real property with Schwartz “following several weeks negotiations between all parties interested.” (*Id.* at p. 239.) The defendant wrongfully repudiated the agreement, resulting in the failure of the transaction. The exchange agreement provided that the broker’s commission was to be paid by Schwartz, not the defendant. Without discussion, and citing *Traxler v. Katz* (1931) 116 Cal.App. 226, the court stated, “It appears to be well settled, however, that where as here the party who is not obligated to pay the commission repudiates the transaction without legal justification he becomes liable for the payment of the commission.” (*Herman v. Savage, supra*, 17 Cal.App.2d at p. 243.)

Martin makes much of the last quoted sentence from *Herman*. But the sole support for the statement in *Herman* is *Traxler v. Katz, supra*, 116 Cal.App.226, where the plaintiff-broker was allowed to recover his entire commission from the breaching party to a real estate exchange agreement notwithstanding both parties had each agreed to pay the broker a separate commission for his services. Both parties signed a writing

acknowledging the plaintiff as the agent for both of them. The court apparently found the parties contemplated that damages for breach of the exchange contract would include the plaintiff's entire commission. (*Id.* at pp. 230-231.)

The *Steinberg* court distinguishes *Herman* and *Traxler* from the case where the breaching party has no relationship with the plaintiff-broker as follows: "It would be idle to discuss the rules of law that would be applicable to the case if defendant [buyer] had engaged the services of plaintiff [broker] to assist him in acquiring the property, and had thereby impliedly agreed with plaintiff that he would buy the property if plaintiff could get it for him upon the agreed terms. [Citation.] *Traxler v. Katz*, 116 Cal.App. 226, and *Herman v. Savage*, 17 Cal.App.2d 238, which are relied upon by plaintiff, were cases in which the broker had acted as the agent of the party who had refused to carry out a contract of exchange and who was held liable to the broker in damages. The opinion in the last case does not state that the broker, plaintiff's assignor, had been employed by and had rendered services to the defendant, but that fact is shown in the briefs, which set forth the agreement of exchange in which it was stated that one of the considerations for defendant's agreement to make the exchange was the services which had been performed by the brokers. The defendant here owed no duty to plaintiff to consummate the purchase of the property and incurred no liability to plaintiff in refusing to go through with the deal." (*Steinberg v. Buchman, supra*, 73 Cal.App.2d at pp. 609-610.)

In *Rader Co. v. Stone* (1986) 178 Cal.App.3d 10, also raised by Martin, the court reversed the trial court's dismissal of the case, holding that the complaint sufficiently stated a cause of action by the plaintiff-broker as a third party beneficiary for his commission for procuring a long-term lease. But the lease and other documentation expressly provided that the broker was the agent of both parties, thus distinguishing the case from the one before us. (*Id.* at pp. 26-27.)

There is no evidentiary support for the trial court's conclusion that Martin was a third party beneficiary of the Contract, thus obligating the Buyers to pay his

commission. In the absence of some relationship between Martin and the Buyers, there is likewise no evidentiary support that the Buyers impliedly agreed to pay Martin's commission by the addition of Paragraph 25D. We find that Paragraph 25D was added merely to alter the amounts of the commissions so that the Sellers would agree to a "rock-bottom" purchase price; there was no promise by the Buyers to pay Martin's commission, as a third party beneficiary or otherwise.

#### DISPOSITION

The judgment is reversed. Appellants are entitled to the costs of appeal.

SILLS, P. J.

WE CONCUR:

ARONSON, J.

IKOLA, J.