154 N.E. 303
(Cite as: 243 N.Y. 439, 154 N.E. 303)

WENDT
v.
FISCHER et al.

Court of Appeals of New York.

Nov. 16, 1926.

Action by Edmund C. Wendt against Paul Fischer and others. Judgment of the Special Term dismissing the complaint and directing an interlocutory judgment in favor of plaintiff was reversed by the Appellate Division (215 App. Div. 196, 213 N. Y. S. 351), a question was certified, and defendants appeal, by permission. Question answered.

Judgment modified.

Appeal, by permission, from a judgment of the Appellate Division of the Supreme Court for the First Judicial Department, which reversed a judgment of the Special Term dismissing the complaint and directed an interlocutory judgment in favor of the plaintiff.

The Appellate Division certified the following question:

'Upon the facts as contained in the decision of the court at Special Term, as modified by the order of this court entered herein on the 15th day of February, 1926, did the failure and omission of the firm of brokers, Fischer, Hammond & Heinrich, to disclose to the plaintiff that the real purchaser of the plaintiff's property was the defendant Hosmer Realty Corporation and that the defendant Edward H. Hammond was the president, treasurer and manager of said corporation constitute as a matter of law such a failure of disclosure or concealment as to amount to a breach of duty on the part of said firm under their employment as brokers by the plaintiff justifying the interlocutory judgment of this court herein?'

BROKERS k32
65k32
That realty brokers, handling land for plaintiff, before selling to corporation headed by one of their members, told plaintiff that sale was to be made to client of their office, held insufficient disclosure, being too indefinite and ambiguous.

BROKERS k32
65k32
If dual interests are to be served by agent, disclosure of principal, to be effective, must lay bare truth without ambiguity or reservation in all its stark significance.

BROKERS k32
65k32
That realty brokers, selling plaintiff's land to one of their members, acted in good faith, that terms obtained were best available, and that the wrong, if any was not accompanied by damage to plaintiff, held immaterial; there having been no disclosure of true facts surrounding transaction to principal.

BROKERS k32
65k32
Realty brokers, selling land to corporation headed by one of their members without full disclosure to landowner, must account to owner for commissions received from sale, but not for profits made by corporation on resale in which realty brokers had no interest.

BROKERS k100
65k100
Where vendor, plaintiff in action for accounting, employed defendants, brokers, to sell realty and they, through dummy transaction, sold land to corporation of which one of defendants was head, holding all stock for beneficial interest of fiancee, sale was voidable at plaintiff's option, defendants not having made full disclosure.

BROKERS k100
65k100
Where fiduciary represents dual interests, law will set aside transaction as soon as that fact is disclosed, without stopping to inquire whether contract or transaction was fair or unfair.

****303 *440** Appeal from Supreme Court, Appellate Division, First Department.

****304 *441** I. Maurice Wormser and Ralph B.

Ittelson, both of New York City, for appellants.

Edward K. Hanlon, Henry B. Hodge and William W. Wilson, all of New York City, for respondent.

***442** CARDOZO, J.

Plaintiff, the owner of a parcel of real estate in the city of New York, employed the defendants Fischer, Hammond & Heinrich, real estate brokers, to find a buyer. He told them that he was willing to sell for $75,000, of which not less than $10,000 was to be paid in cash. They brought him an offer of $80,000, but only $7,500 cash. This offer he accepted. The contract was made and the title closed in the name of a 'dummy,' but the real purchaser was the defendant Hosmer Realty Corporation. The president, treasurer, and manager of this corporation was the defendant Hammond, a member of the firm of brokers. He was also the record owner of the entire capital stock, though the beneficial interest was in Florence E. Pelletreau, to whom he was engaged to be married. Hammond did not inform the plaintiff the he was an officer of the Hosmer Realty Corporation, the buyer, or that he was connected with it in any way. All that he said was that the offer to buy the property had been made by a client of the firm. The truth came out a few weeks after the conveyance, when the property was resold by the Hosmer Realty Corporation for $87,500, an increase of $7,500 above the price paid to the plaintiff. This action for an accounting followed. The Special Term dismissed the complaint. The Appellate Division reversed, and certified a question for answer here.

***443** [1][2] We think the sale was voidable at the option of the seller. Hammond, employed to sell, was under a disability to buy without full and frank disclosure of his relation to the purchase. Carr v. National Bank & Loan Co. of Watertown, 167 N. Y. 375, 60 N. E. 649, 82 Am. St. Rep. 725; National Bank & Loan Co. v. Carr, 189 U. S. 426, 23 S. Ct. 513, 47 L. Ed. 881; Nekarda v. Presberger, 123 App. Div. 418, 107 N. Y. S. 897. We are told that the sale may be upheld because his ownership of the stock was nominal and the profits of the transaction would benefit another. Even so, the conflict was not reconciled between divided claims to fealty. As broker for the seller, the duty of this fiduciary was to make the terms as favorable to his employer and the price as high as possible. As president and manager of the buyer corporation, its sole representative in the transaction, his duty was just the opposite. Munson v. Syracuse, G. & C. R. Co., 103 N. Y. 58, 8 N. E. 355. We are told that the corporation is to be blotted out of the picture, and the case viewed as if the equitable owner of the shares who supplied the corporation with the money for the purchase, had taken title in her own name. The difficulty is that she preferred for reasons sufficient to herself to vest the title in another. The courts are not at liberty to nullify her choice and remake the transaction into something other than it was. We are told that the conflict flict of interest was sufficiently revealed when the brokers informed the plaintiff that the sale was to be made to a client of their office. Disclosure so indefinite and equivocal does not set the agent free to bargain for his own account or for the account of a corporation which acts through him alone.

[3][4][5] If dual interests are to be served, the disclosure to be effective must lay bare the truth, without ambiguity or reservation, in all its stark significance (Dunne v. English, L. R. 18 Eq. 524; Imperial Merc. & Credit Assn. v. Coleman, L. R. 6 H. L. 189). Finally, we are told that the brokers acted in good faith, that the terms procured were the best obtainable at the moment, and that the wrong, if any, was unaccompanied by damage. This is no sufficient answer by a trustee forgetful of his duty. The law 'does ***444** not stop to inquire whether the contract or transaction was fair or unfair. It stops the inquiry when the relation is disclosed, and sets aside the transaction or refuses to enforce it, at the instance of the party whom the fiduciary undertook to represent, without undertaking to deal with the question of abstract justice in the particular case.' Munson v. Syracuse, G. & C. R. Co., supra, at page 74, 8 N. E. 355; cf. Dutton v. Willner, 52 N. Y. 312, 319. Only by this uncompromising rigidity has the rule of undivided loyalty been maintained against disintegrating erosion.

[6][7] A question remains as to the remedy available. The defendant Hosmer Realty Corporation must account for the profits of the resale. Falk v. Hoffman, 233 N. Y. 199, 201, 135 N. E. 243; Hammond v. Pennock, 61 N. Y. 145, 156. It got no title to the property except one that was subject to a ****305** trust, for in the acceptance of its title it was acting through the trustee and no one else. National Bank & Loan Co. v. Petrie, 189 U. S. 423, 23 S. Ct. 512, 47 L. Ed. 879; Carr v. Nat. Bank & Loan Co., supra. When the property was resold, the trust was impressed upon the proceeds. The defendants Fischer, Hammond & Heinrich, the brokers, are accountable for the moneys

paid to them for commissions. Mack v. Latta, 178 N. Y. 525, 71 N. E. 97, 67 L. R. A. 126. Commissions were not earned unless duty had been done. Murray v. Beard, 102 N. Y. 505, 7 N. E. 553. We think the judgment goes too far, however, in declaring the brokers to be accountable for profits. We do not need to consider what their liability would be if the plaintiff were limiting his claim of recovery to the reasonable value. Mack v. Latta, supra. That is not the theory of the action or the judgment. The plaintiff elects to charge the Hosmer Realty Corporation with the profits that have come to it as upon a sale for his account. Hammond v. Pennock, supra; Ferris v. Van Vechten, 73 N. Y. 113. The brokers took no part in effecting the resale and had no share in the profits realized therefrom. The corporation resold and collected and enjoyed the ***445** proceeds. It, and no one else, as to this increment of value, is to be charged as a trustee.

The judgment should be modified by providing that the defendants Fischer, Hammond & Heinrich shall be accountable only for their commissions, and, as modified, affirmed, with costs against the defendant Hosmer Realty Corporation; and, subject to the foregoing modification, the question certified is answered in the affirmative.

HISCOCK, C. J., and POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

LEHMAN, J., absent.

Judgment accordingly.

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