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OFFER TO PURCHASE PROPERTY, DULY EXECUTED — PROSPECTIVE PURCHASER — MONEYS DEPOSITED WITH BROKER TO BE HELD IN TRUST UNTIL OFFER TO PURCHASE ACCEPTED — IF NO ACCEPTANCE, MONEY TO BE RETURNED TO PURCHASER — DUTY OF BROKER TO RETURN SUMS DEPOSITED IN TRUST TO OFFEROR IF PRIOR TO ACCEPTANCE BY SELLER, PURCHASER-OFFEROR REVOKES OFFER—BROKER MAY NOT RETAIN SUCH MONEYS AS SET-OFF AGAINST COMMISSIONS CLAIMED TO BE DUE HIM.

SYLLABUS:

When a prospective purchaser has executed an offer to purchase certain property and has deposited moneys with the broker to be held in trust by him until such offer of purchase has been accepted or, if not accepted, to be returned to the purchaser, if the purchaser-offeror revokes such offer prior to its acceptance by the seller, it is the duty of the broker to return such sums deposited in trust to the offeror. Such moneys may not legally be retained by the broker as a set-off against commissions claimed to be due him.

Columbus, Ohio, December 31, 1943.

State Board of Real Estate Examiners, 407 Wyandotte Building,
Columbus, Ohio.

Gentlemen:

I have your request for my opinion, which reads as follows:

“At a meeting of the Board held in Columbus on October 26th, the following question was raised, and inasmuch as there was a variance of opinion among the members, we are writing you for an official opinion for the guidance of the Board in deciding future cases which come before them.

An Offer to Purchase was presented in the hearing of a complaint against a real estate licensee, in which offer there appeared the following clause:

‘In consideration of your services as Agent, this proposition is in effect to and including _____ 19____. _____ hereby deposit with your firm \$_____, to be held in trust by you until this proposition, or any modification thereof, is accepted and conditions fulfilled. If this proposition, or any modification thereof is not accepted, you are to return to me the above named deposit.’

The prospective purchaser signed this offer, but prior to the acceptance by the seller withdrew his offer and requested the return of the deposit, which the broker refused to return in view of the foregoing clause.

Is the broker within his rights in retaining the deposit even though the request for withdrawal was made before the seller signed the offer?"

Your inquiry does not involve the question as to whether the buyer in question would be liable to the broker for an agreed commission in the event of such buyer's withdrawal of the offer to purchase. I, therefore, herein express no opinion concerning such proposition. Likewise, you do not inquire whether, under the terms of the "offer to purchase" contained in your inquiry, the purchaser had the right to revoke such offer prior to the date which might have been inserted in the blanks contained in such offer. I, therefore, have given no consideration to such proposition.

Your inquiry is solely as to whether the broker may retain "the deposit * * * to be held in trust" in the event of the withdrawal of such offer.

Assuming for the purposes of argument, but without expressing any opinion thereon, that the broker was entitled to a commission upon the revocation of the offer, would the broker have the right to retain the deposit made with him?

From the express language of the offer the money was delivered to the broker to be "held in trust" until the offer was accepted, or, if not accepted, returned to the offeror.

There is a well established principle in the law of contracts that an offer may be revoked by the offeror at any time before it is accepted unless supported by a consideration.

Bretz v. Union Central Life Insurance Company, 134 O. S.
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Brenner v. Speigle, 116 O. S. 631, 637

Longworth v. Mitchell, 26 O. S. 334

Miller v. Bates, 29 O. App. 7

From the terms of the offer to purchase, as quoted in your letter, there is no intimation of the existence of any consideration between the seller and buyer to support a promise to hold such offer open for acceptance. I must, therefore, assume that none exist. If, therefore, the offer

was withdrawn prior to such acceptance as stated in your inquiry, it could not thereafter be accepted by the buyer and under the express terms of the "offer to purchase" quoted in your letter, the broker was to "return to me the above named deposit". Such was his contractual duty.

However, in determining whether the broker might retain the deposit, we must bear in mind the provisions of Section 11321 of the General Code, which section provides that:

"When cross-demands have existed between persons under such circumstances that if one had brought an action against the other a counterclaim or set-off could have been set up, neither can be deprived of the benefit thereof by assignment by the other, or by his death. The two demands must be deemed compensated so far as they equal each other."

Section 11319 of the General Code, which defines "set-off", reads:

"A set-off is a cause of action existing in favor of a defendant against a plaintiff between whom a several judgment might be had in the action, and arising on contract or ascertained by the decision of a court. It can be pleaded only in an action founded on contract."

It has been held under the provisions of the above quoted sections that the cross-demands therein mentioned must co-exist in the same right before they may be deemed compensated. *Andrews v. State, ex rel. Blair*, 124 O. S. 348. Thus, when a sum is due from a person in a fiduciary capacity as, for example, a trustee, agent, administrator, executor, receiver, etc., it may not be set off against a claim due such person in his individual capacity and vice versa. Since the moneys in question were held by the broker in a trust or possibly an agency capacity the broker is not authorized, under such sections, to set off such moneys due to the purchaser against a debt owing from him to such broker.

Specifically answering your inquiry, it is my opinion that when a prospective purchaser has executed an offer to purchase certain property and has deposited moneys with the broker to be held in trust by him until such offer of purchase has been accepted or, if not accepted, to be returned to the purchaser, if the purchaser-offeror revokes such offer prior to its acceptance by the seller, it is the duty of the broker to return such sums deposited in trust to the offeror. Such moneys may not legally be retained by the broker as a set-off against commissions claimed to be due him.

Respectfully,

THOMAS J. HERBERT,
Attorney General.