JACK A. MORRIS,	)	
	)	
Plaintiff/Appellee,	)	
	)	Rutherford Chancery
	)	No. 92CV-76
Vs.	)	
	)	Appeal No. 01-A-01-9408-CH-00391
	)	
RICHARD JOHNSON, ET AL,	)	
	)	
Defendants/Appellants.	)	

IN THE COURT OF APPEALS OF TENNESSEE

MIDDLE SECTION AT NASHVILLE

APPEAL FROM THE CHANCERY COURT OF RUTHERFORD COUNTY

AT MURFREESBORO, TENNESSEE

HONORABLE ROBERT E. CORLEW, III, CHANCELLOR

Richard L. Dunlap
Third Floor, Commercial Bank Building
Paris, Tennessee 38242
ATTORNEY FOR PLAINTIFF/APPELLEE

John D. Drake
203 East Lytle Street
Murfreesboro, Tennessee 37130
ATTORNEY FOR DEFENDANT/APPELLANT

AFFIRMED AND REMANDED.

LEE RUSSELL, SPECIAL JUDGE

CONCUR:
HENRY F. TODD, PRESIDING JUDGE
SAMUEL L. LEWIS, JUDGE

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O P I N I O N

The Defendant appeals from a judgment in favor of the Plaintiff rendered by the trial judge, sitting without a jury, in a case brought by a licensed real estate broker to recover his sales commission from the owner of the real estate. The owner listed his property with the Plaintiff realtor, who obtained the signatures of a prospective buyer and the seller on an Agreement of Sale. The sale was never closed. We affirm the award of a judgment below for the amount of the commission.

Richard Johnson was the owner of a plumbing supply business which he wished to sell as a going concern. Defendant Johnson listed the business, including the realty on which it was located, with Plaintiff Jack A. Morris, a duly licensed real estate broker. The written listing agreement was for a period of three months and allowed the Plaintiff to receive a commission of seven percent of the purchase price or $7,500.00, whichever was greater, when the broker procured a buyer "ready, willing, and able" to purchase the property. The Agreement for Sale contained this provision: "In accordance with the agreement between Seller's broker and Seller, Seller shall pay the Seller's broker the sum of $35,000.00."

Another clause in the Agreement of Sale requires that three "contingencies" be met before closing could be completed. These three contingencies were that mutually agreeable closing documents be generated, that the purchaser do a due diligence review to determine whether material changes or inaccuracies regarding the financial condition of the business existed, and that the current employees of the business agree to remain with the business for a period of at least

six months. The Defendant argues that the so-called contingencies were conditions precedent to sale and that the second contingency, the due diligence review by the buyer, never occurred and that therefore the Defendant never became obligated to pay a commission to the Plaintiff.

It has long been the law in Tennessee that when an owner of real estate agrees to pay a real estate brokerage commission "to procure a purchaser" of the land, then the broker has earned his commission when he effects a valid written contract for sale of the lands, upon terms and with a purchaser acceptable to the owner. *Parker v. Walker,* 86 Tenn. 565, 570, 8 S.W.2d 391 (1888); *Dobson & Johnson, Inc. v. Weiland,* 644 S.W.2d 394, 396. Neither the purchaser's subsequent refusal to perform his contract of sale upon grounds not attributable to the broker, nor the voluntary failure of the seller to compel the purchaser to complete the sale, will defeat the broker's claim for his commission. *Parker* at 569, 570; *Dobson & Johnson* at 396. This is true even when the buyer refuses to complete the sale because of an alleged flaw in the title and where the owner refuses to file suit for specific performance. *Parker* at 570. Any objection to the ability of the proposed purchasers to complete the transaction should be raised by the seller before the seller accepts the purchasers by signing his name to the sales contract, and such objection cannot be raised after the contract to sell has been signed. *Id.* at 571. The seller binds himself to sell to those particular buyers when he signs the contract of sale. *Id.* The *Parker* court goes on to give this policy consideration for requiring the payment of commissioners to real estate brokers where the sale is never completed:

> If a seller prefers to release a purchaser who is morally and legally bound to comply with his bargain, he ought not to complain if the law holds that he can not do so at the expense of the broker, whose labor and ability have brought about a binding agreement.

Id. at 572.

The western section of the Court of Appeals dealt with the issue of when and whether a broker's commission is earned without the occurrence of a final closing of a sale in the case of *French, Clayton, Johnson & Associates and Fredrich Clark Realty v. Coker, et als,* 1993 Tenn. App. LEXIS 675 (1993). In that case, the defendants listed their house for sale with the plaintiff realty company because the husband of the couple had been notified that he was being transferred

to another community. The realty company procured a buyer for the house, and a written sales agreement was signed by the parties. The sellers then learned that the husband would not be transferred, and the buyers and sellers mutually agreed not to complete the sale. The real estate company generated a written agreement voiding the sale, but this agreement expressly reserved the issue of commissions.

The trial judge in *French, Clayton* had granted summary judgment to the plaintiff realtor, but the Court of Appeals reversed on the grounds that there was a fact issue as to whether the realtor had orally agreed to forego receiving a commission. However, on the issue of the effect of the mutual rescission of the sales agreement on the entitlement of a broker to a commission, the Court quoted with approval this language from *Realty Associates of Sedona v. Valley National Bank of Arizona,* 153 Ariz. 514, 738 P.2d 1121, 1125 (Ariz. App. 1986) as follows:

> The well-established rule regarding entitlement to a real estate commission [states that] in the absence of a specific contract to the contrary, when a real estate broker has brought together the parties to a sale or exchange of real estate, and they have agreed fully on the terms and entered into a binding contract for such sale or exchange, his duties are at an end and his commission is fully earned, and it is immaterial that the parties to the contract rescind mutually or that one or the other thereof defaults and the sale or exchange is not fully effected.

Realty Assocs., 738 P.2d at 1125.

The *French, Clayton* court went on to observe as follows on the issue of entitlement of a broker to a commission:

> If a contractual provision appeared in the contract specifically addressing when the broker's commission was earned, such would be controlling between the parties. This contract, however, merely provides that "commission shall be paid by the seller at closing. . ." Nothing in this contract indicates that closing was a condition precedent to the earning of French and Fridrich's commissions. A contractual provision is not a condition precedent unless it clearly appears from the contract itself that the parties intended such. *Miller v. Resha,* 820 S.W.2d 357, 360 (Tenn. 1991). No such intention appears after examining the contract as a whole.
>
> A broker's commission is not affected by the mutual cancellation by the parties of an executed contract, unless the broker consents. *See Consolidated Realty Co. v. Graves,* 291 Ky. 456, 165 S.W.2d 26, 29 (Ky. App. 1942).

The Defendant relies upon the unpublished case of *Inman v. Alexander*, 1992 WL 4778, 5 (Tenn. App. 1992) for the proposition that the general rule that a broker earns a commission upon the signing of a contract of sale may be "varied by contingencies" similar to the three contingencies found in the parties' Agreement of Sale in the case now pending. We do not find

that the *Inman* case supports the Defendant's position. In *Inman*, the broker secured a contract of sale on a farm signed by the sellers and the buyers, but the sellers could not close because of litigation with an earlier potential buyer. When that litigation was resolved, the buyers failed to appear at the closing. The trial judge excluded proof of the buyers' actual ability to purchase and awarded the broker his full commission from the sellers. The western section of the Court of Appeals modified the trial court's judgment while upholding the exclusion of the evidence concerning ability to purchase.

In *Inman*, the contract of sale stated that a "commission shall be earned at such time as this contract is accepted by all parties, and all conditions herein met." If the seller breached, the seller would be responsible for the commission, and if the buyer breached, the buyer would be responsible for the commission, but in either event, the earnest money would first be applied to pay the commission. The Court of Appeals ruled that the commission was earned when the contract of sale was signed and cited with approval this passage from the case of *Dobson & Johnson, Inc. v. Weiland*, 644 S.W.2d 394, 196 (Tenn. 1982):

> [A] broker who agrees for compensation to procure a purchaser of land, has earned his commission when he effects a valid written contract of sale, upon terms and with a purchaser acceptable to the owner; neither the purchaser's refusal to perform his contract on grounds not imputable to the broker's fault, nor the voluntary failure of the vendor to compel him to do so will defeat the broker's claim for commission.

The *Inman* court goes on to state that the broker's general obligation "may be varied by contingencies and broadened or narrowed by specific contract." The *Inman* court applied this latter principal to hold that the contract of sale in that case specifically stated that the buyers would pay the commission if the buyers breached the contract of sale. The *Inman* court therefore held that the buyers owed the commission, but required the sellers to reimburse to the broker toward that fee all of the earnest money previously paid by the buyers and pocketed by the sellers. The *Inman* court simply applied the specific terms of that contract of sale not to alter when a commission was earned, but to alter by whom it should be paid.

The Defendant in the case now pending urges that the three contingencies or conditions in his Agreement of Sale similarly alter application of the general rule because one of the

contingencies was never met. This argument fails for multiple reasons. The contingencies or conditions contained in the sales agreement and applied in the *Inman* case dealt directly with the payment of the commission, not with the closing of the sale. The *Inman* conditions determined who would pay the commission to the broker, not when a commission was earned. The *Inman* court applied the general rule on when the commission was earned and held that the commission was earned when the sales agreement was signed. The contingencies in the Agreement of Sale in the present case deal with contingencies to be met before closing, not contingencies to be met before a commission was earned. The Defendant would be correct and the *Inman* exception would be applicable to alter the general rule here if the Agreement of Sale had stated that it was a condition precedent to the broker earning a commission for the sale actually to close. The Agreement of Sale, however, did not read this way, and the three contingencies were mere contingencies to be met before the sale would close. The Agreement of Sale was silent on who was responsible to pay the commission in the event of a failure to close.

The Defendant cites the case of *Tooley v. Cook*, 262, S.W.2d 875 (Tenn. App. 1952) for the proposition that a broker may recover his commission on a sale that is not ultimately closed only if the closing was prevented by the fault or refusal of the seller to close. As is pointed out in the *Inman* case, however, *Tooley* is distinguishable because the buyer and seller there had not entered into a written contract of sale. The broker in *Tooley* relied unsuccessfully on a contract of sale which he, the broker, had signed with the buyer, something the Court of Appeals held that the broker had no authority to do. *Inman* at 11.

Much of the proof in this trial deals with whether the Defendant or the buyer was ultimately at fault in the failure of this sale to close. The trial court found that the Defendant "sabotaged" the closing. The fault in the failure to close does not control whether or from whom the commission was owed so it is not necessary here to review all of the evidence that supports the trial judge's conclusion. It is observed, however, that the evidence was more than sufficient

to support the trial judge's conclusion that the Defendant's conduct brought about the failure to close.

The Plaintiff earned his commission when the Defendant and the buyer of the business signed their Agreement of Sale. The terms of the Agreement of Sale and of the Listing Agreement when read together made the Defendant responsible upon the signing of the Agreement of Sale to pay a commission of $35,000.00 to the Plaintiff. Nothing in the two written agreements altered when the commission was earned or from whom, and neither agreement made the earning of the commission contingent on the closing of the sale. The trial court is therefore affirmed.

AFFIRMED AND REMANDED.

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LEE RUSSELL, SPECIAL JUDGE

CONCUR:

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HENRY F. TODD, PRESIDING JUDGE

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SAMUEL L. LEWIS, JUDGE