In our judgment the Antrim Township Zoning Hearing Board correctly concluded appellants had not sustained their burden of proof and denied their application for a special exception, for:

1. Their application was fatally defective by reason of their failure to have Sketch Development Plan accompany it.

2. The appellants introduced no evidence as to the plan for storage and arrangement of junk and used cars, for drainage facilities and to facilitate access for firefighting purposes as required by Section 12 d and e; nor did they demonstrate or exhibit compliance with the property line set back requirement or proposed ground cover planting as required by Section 12 g. Had the appellants provided the Sketch Development Plan required by Article IX Section 9.4 D 1 of the Zoning Ordinance these fatal omissions might have been cured.

3. The objectants persuasively rebutted the appellants' evidence as to the suitability of their proposed use and sustained their burdens of presentation and persuasion that the granting of the special use would adversely affect this area of Antrim Township economically and aesthetically.

4. The objectants sustained their burdens of establishing that due to the narrow, hilly, curving layout of the access roads to appellants' real estate, coupled with the existence of a one-lane bridge, the proposed special use would have a serious detrimental effect on traffic and pedestrian safety.

ORDER OF COURT

NOW, this 20th day of August, 1985, the appeal of Gary Linebaugh and Dave Shockey, appellants, is dismissed.

Costs to be paid by appellants.

Exceptions are granted appellants.

VAN MATER REAL ESTATE V. SYLVANIA SHOE, C.P. Franklin County Branch, A.D. 1984 - 283

Open Listing Agreement - Agency - Identity of Purchaser

1. "Open listing" means the agent may show a property and if he affects a sale, he will be paid a commission, but if the owner effects a sale, no commission is paid the agent.

2. A broker must allege his employment, either expires or implied, or by acceptance or ratification of his acts.

3. A mere volunteer is not entitled to a commission even though he brings the parties together and is the procuring cause of the sale.

4. Where a broker deals with a prospective purchaser individually and the prospective purchaser forms a partnership which purchases the property, the broker may recover a commission if he can prove that there was an unbroken chain of events between the initial contact with the individual and the subsequent sale of the partnership.

David S. Cleaver, Esquire, Counsel for plaintiff

Michael B. Finucane, Esquire, Counsel for defendant

OPINION AND ORDER

EPPINGER, P.J., September 9, 1985:

Plaintiff, Van Mater Real Estate Services Company, Inc. (Van Mater), is a licensed real estate broker. On April 18, 1984, Van Mater and the defendant, Sylvania Shoe Manufacturing Corporation, (Sylvania), entered into an open listing agreement[1] whereby Van Mater was named agent of Sylvania for the purpose of attempting to sell real estate owned by Sylvania and located in Washington Township, Franklin County, Pennsylvania. [2]

The agreement provided for the payment of a commission of six (6%) percent of the total sales price if the real estate was sold to a purchaser originally procured by Van Mater. The agreement stated that Van Mater would like to register Tom Beck as its client on the showing of the property. On April 18, 1984, Van Mater contacted Tom Beck and showed him Sylvania's real estate in an attempt to sell the property to him. For some reason, Beck did not

[1] Plaintiff's Complaint, Exhibit B.
[2] Plaintiff's Complaint, Exhibit A.

purchase the property at that time. The agreement expired at midnight, April 18, 1984.

On July 1, 1984, Sylvania's real estate was sold through another realtor, Ausherman Brothers, to Way-Beck Properties, (Way-Beck). Way-Beck entered into a written agreement of sale [3] with Sylvania to buy the property for $268,700. Way-Beck is a Pennsylvania general partnership, one of the general partners of which is Tom Beck.

On September 17, 1984, Way-Beck assigned the agreement of sale to Welty Associates, a Pennsylvania general partnership. The general partners of Welty Associates are Tom Beck and J. Edward Beck, Jr.

Van Mater filed suit against Sylvania on December 13, 1984, alleging that in contacting Tom Beck, it was the efficient, moving, and procuring cause of the sale and is thus entitled to a commission of $16,122. On February 6, 1985, Sylvania filed preliminary objections to the complaint in the nature of a demurrer and a motion for more specific pleading which are now before us.

As a basis for its demurrer, Sylvania contends that the open listing agreement with Van Mater was only good for April 18, 1984, and that Van Mater's failure to procure a purchaser by midnight on that day terminated the agreement. There was no extension of the terms of the agreement. Sylvania further argues that Van Mater made no allegation that it procured either Way-Beck or Welty Associates, the ultimate purchasers of the premises.

The principles to be applied when ruling upon a demurrer are well established. A demurrer can only be sustained where the complaint is clearly insufficient to establish the pleader's right to relief. *Firing v. Kephart*, 466 Pa. 560, 563-64, 353 A.2d 833, 835 (1976). For the purpose of testing the legal sufficiency of a complaint, a demurrer admits as true all well-pleaded, material, relevant facts. *Savitz v. Weinstein*, 395 Pa. 173, 174, 149 A.2d 110,

[3] Plaintiff's Complaint, Exhibit C.

111 (1959); *March v. Banus,* 395 Pa. 629, 632, 151 A.2d 612, 614 (1959), and every inference fairly deducible from those facts, *Hoffman v. Misericordia Hospital of Philadelphia,* 439 Pa. 501, 504, 267 A.2d 867, 868, (1970); *Stein v. Richardson,* 302 Pa. Super. 124, 136, 448 A.2d 558, 564 (1982). The pleader's conclusions or averments of law are not considered to be admitted as true by a demurrer. *Savitz*, supra at 174, 111.

A demurrer should be sustained only in cases that clearly and without doubt fail to state a claim for which relief may be granted. If the facts as pleaded state a claim for which relief may be granted under any theory of law then there is sufficient doubt to require the demurrer to be rejected. *County of Allegheny v. Commonwealth,* Pa. , 490 A.2d 402, 408 (1985).

There are several problems with Van Mater's complaint. It alleges in paragraph 7 that, under the terms of the agreement, it had the exclusive right to attempt to *sell* said real estate to Tom Beck. (Emphasis added). In its brief, Van Mater claims the agreement granted it the exclusive right to *contact* Tom Beck in an attempt to sell the property. [4] (Emphasis added). We see nothing in the agreement which could be construed as giving Van Mater the exclusive right to either sell or contact Tom Beck concerning said property. "A broker can acquire an exclusive right of sale only by a contract in unequivocal terms or by necessary implication." *Wilson v. Franklin,* 282 Pa. 189, 191, 127 A.2d 609, 609 (1925); *Szemis v. Szlachta,* 172 Pa. Super. 351, 353, 93 A.2d 892, 893 (1953).

Sylvania contends that Van Mater should be required to set forth with particularity which terms of the agreement give Van Mater its exclusive right. We see no need to do this. According to the agreement, any exclusive right Van Mater had expired at midnight, April 18, 1984. It cannot be presumed that Van Mater could have an exclusive right of indefinite duration.

The agreement is labeled an "open listing agreement". "Open listing" means that the owner, Sylvania, agrees that the agent, Van Mater, could show the property to prospective purchasers and, if Van Mater effected a sale under the contract terms, it would be

[4] Van Mater's Brief, page 1.

paid the agreed upon commission, and if Sylvania itself sold the property by its own efforts or through another broker, no commission would be owed to Van Mater. *Miller v. Jones,* 54 Tenn. App. 31, 387 S.W.2d 627, 628 (1964). An open listing agreement is defined as the antithesis of an exclusive listing, *Words and Phrases,* Vol. 29A, page 374, under which the broker would be entitled to a commission in the event the owner made a sale within the stipulated time, whether or not due to the broker's efforts.

Since the open listing agreement expired at midnight, April 18, 1984, Van Mater had no right or obligation to attempt to sell the property after that time. The agreement allowed Van Mater to attempt to find a buyer only on April 18, 1984. Van Mater alleges that it continued to have contact with Tom Beck from April 18, 1984, until July 1, 1984 [5] but does not allege under what contractual authority, express or implied, it was operating.

A broker must allege his employment, either express or implied, or by acceptance or ratification of his acts. *Lancaster County Farmers National Bank Appeal,* 421 Pa. 448, 450, 219 A.2d 657, 658 (1966). Van Mater must allege under what authority it was attempting to sell the property after April 18, 1984. A mere volunteer is not entitled to a commission though he brings the parties together and is the procuring cause of the sale. *Porter & MacDowell Co. v. Cavazza,* 100 P.L.J. 235, 242 (1952); *Clyde v. First National Bank of Chester,* 54 D.&C. 514, 516 (Del. 1946).

All the reasoning and supporting authority advanced by Van Mater assumes one fact — that it was actually or impliedly employed by Sylvania after April 18, or that Sylvania accepted and ratified its actions. Van Mater cannot thrust itself upon Sylvania and claim an agency relationship; and if we were to follow this contention that is exactly the principle we would be forced to sanction. *Porter*, supra at 241. In most similar real estate transactions there are many persons who, through their relationship and discussions with the proposed buyer, could be classified as a procuring cause, but they surely have no right to a commission.

Even if Van Mater could show that it was employed, actually or impliedly, after April 18, 1984, or that Sylvania had accepted and

[5] Plaintiff's Complaint, paragraph 9.

LEGAL NOTICES, cont.

416, the place of beginning. Containing 32,911 square feet as per the survey of George H. Herbert, R.S., dated October 1982.

YOU SHOULD TAKE THIS NOTICE TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

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of Franklin-Fulton Counties
Court House
Chambersburg, PA 17201
Telephone No.: (717) 264-4125, Ext. 213

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Attorney for Plaintiffs
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Chambersburg, PA 17201

3-14, 3-21, 3-28

ratified its actions, there remains another major obstacle it must overcome in order to state a cause of action. Under the terms of the agreement, Van Mater can recover a commission only if the property is sold or traded to a purchaser originally procured by Van Mater. Under the facts as alleged, this will be difficult for Van Mater.

The facts Van Mater must allege in its complaint would be very simple if the only purchaser involved in this sequence of events was Tom Beck. However, this is not such a simple situation. For some reason, Tom Beck did not buy the property when contacted by Van Mater on April 18, 1984. Several months later, a separate entity, Welty Associates - a partnership, bought the property. The question is whether Van Mater's right to compensation is affected by the fact that the customer procured by it, Tom Beck, joined with another in forming a partnership, Welty Associates, which was the eventual purchaser of the property. For this reason, most of the cases cited in the parties' briefs are inapplicable.

There is no Pennsylvania case pertaining to this question, therefore, we had to examine the law of other states. It is the general rule in this country, "that a broker's right to a commission is not affected by the fact that the customer procured by him became associated with others who joined with such customers in the purchase of property." *Zetlin v. Scher,* 217 A.2d 266, 269 (Md. Ct. of Appeals 1966); 164 ALR 949, 949.

For this rule to apply, however, a broker must allege and prove several facts. Van Mater must allege that it was the "dominant personality", *Holton v. Shepard,* 197 N.E. 460, 464 (Sup. Jud. Ct. of Mass. 1935), in the purchase of the property and that it set in motion a chain of events which, without break in their continuity, caused Welty Associates and Sylvania to come to terms as the proximate result of its activities.

Different courts phrase this rule differently but they all require an unbroken chain of events, or a continuity, between the initial contact with Tom Beck and the subsequent sale to Welty Associates. The New Mexico Supreme Court held that,

"the decisive thing is that the person whom the broker has first interested retains an active interest in the transaction which can be found to be the efficient cause of the ultimate purchaser being produced." *Hudgens v. Caraway,* 235 P.2d 140, 141 (N.M. 1951).

Ohio, California, and North Carolina all require that there be "no break in the continuity" between the series of events beginning with the initial contact with the prospective purchaser and the subsequent sale to the syndicate or partnership of which he is a member. *Thomas Reap Realty Co. v. Hadlock*, 181 N.E.2d 732, 734 (Ohio Ct. of Appeals 1961); *Lichtig & Rothwell v. Holubar,* 78 Cal. App. 511, 248 P. 735, 736 (1926); *Marshall v. White,* 245 F.Supp. 514, 517 (W.D.N.C. 1965). Colorado also follows this view and further inquires, "was the transaction which the broker was authorized to negotiate substantially consummated as the direct result of his efforts." *George v. Dower,* 240 P.2d 897, 904 (Col. 1952).

In *George*, supra, as in *Thornton,* supra, the courts implied that if the initial prospective purchaser was the one who contacted the other partner(s) or member(s) of a syndicate then the broker would be entitled to a commission, but if the seller was the one who contacted the other partner(s) or syndicate member(s) then the broker should receive no commission. If the initial prospective purchaser had induced the other partner(s) or syndicate members to join him in the purchase "then the chain of causation might have been unbroken." *George*, supra at 904.

While, as previously discussed, there are no Pennsylvania cases directly addressing this situation, there are implications from Pennsylvania courts that they would follow the above-mentioned views. In *Shapira v. Union Trust Co. of Pittsburgh,* 306 Pa. 35, 41, 158 A. 564, 566 (1931), the court held a broker was entitled to a commission where a corporation, which was the creature of the purchaser, actually took title to the property, and, "there was no break in the chain of causation." In *Cocci v. Haas*, 23 Chest. Co. Rep. 245, 249 (1974), the court defined "procuring cause" as, "the cause originating a series of events which, without a break of continuity, results in the sale."

In its brief, Sylvania cites three cases which stand for the proposition that where a broker's prospect does not buy the property and it is thereafter sold to a partnership, of which the

prospect is a member, the broker is not entitled to compensation. *Prusiner v. Holsberg,* 159 Iowa 45, 139 N.W. 913 (1913) (dictum); *Murray v. Kennan,* 191 Iowa 998, 183 N.W. 491 (1921); *English v. William George Realty Co.,* 55 Tex. Civ. App. 137, 117 S.W. 996 (1909). Even these cases, however, imply that if the broker could show "no break in the continuity" of events, or no break in "the chain of causation," then he could recover. Both *Murray* and *Prusiner* stated that the broker had no right to a commission where the sale was subsequently made to the prospective customer and another person, "without the intervention of the agent." *Murray,* supra at 493; *Prusiner,* supra at 914.

In *English*, supra at 999, the court held the broker was not entitled to a commission where there was, "not the remotest connection," between the sale and the broker's contact with the prospective customer. The court required a "causal connection" between the initial contact with the prospective customer and the subsequent sale to a firm of which he was a member. *Id.* at 999.

A sale to a partnership occurred in *Cumberland Savings & Trust Co. v. McGriff,* 61 Fla. 159, 54 So. 265 (1911), and the court held the broker was entitled to a commission where he introduced the owner to the prospective purchaser, continued to discuss the matter with the person so introduced, who subsequently, with a partner, purchased the property by negotiations in which the broker took no part. The key to the broker's recovery appeared to be that he continued to keep the prospective purchaser interested in the property.

Van Mater has not made any allegations in its complaint that there was "no break in the continuity" between the initial contact with Tom Beck and the subsequent sale to Welty Associates. There are no allegations that the "chain of causation" remained unbroken, that it continued to keep Tom Beck interested in the property, or that Tom Beck retained an active interest in the property. If Van Mater, or Tom Beck, contacted and interested J. Edward Beck, Jr., in the property then that should be alleged.

The bare allegation in paragraph 9 of the complaint that Van Mater "continued to have contact" with Tom Beck, provided it had authority to, is not sufficient. The facts underlying this continuing contact must be alleged.

"Pennsylvania is a fact-pleading state . . . a complaint must not only give the defendant notice of what the plaintiff's claim is and the grounds upon which it rests, but it must also formulate the issues by summarizing those facts essential to support the claim." *Alpha Tau Omega Fraternity v. University of Pennsylvania,* 318 Pa. Super. 293, 298, 464 A.2d 1349, 1352 (1983).

This court has long held that it is not enough to plead legal conclusions without pleading the ultimate facts underlying them. *Cullings v. Farmers & Mechanics Trust Co. of Chambersburg,* 8 D.&C.3d 764, 767 (Franklin 1978). All Van Mater has alleged are conclusions that it "continued to have contact"[6] with Tom Beck, and that it was "the efficient, moving and procuring cause of the sale."[7] That is simply not enough to constitute a cause of action. Van Mater must allege specifics in its complaint regarding the negotiations that occurred with Tom Beck, J. Edward Beck, Jr., and Welty Associates and under what authority it was conducting such negotiations. These specific facts are material to its theory or recovery and are essential to the preparation of a defense.

As phrased, paragraph 9 of its complaint represents another problem for Van Mater. Paragraph 9 alleges Van Mater continued to have contact with Tom Beck *up until* the property was listed with Ausherman Brothers on July 1, 1984. (Emphasis added). This implies that there was a break in the negotiations between Van Mater and Tom Beck. If this was the case, then Van Mater is not entitled to a commission. Where,

"there is a break in their negotiations . . . and, at a later date, the property is sold to the same prospective buyer, the original broker is not entitled to a commission." *Baumbach v. Seip,* 442 Pa. 443, 447, 275 A.2d 71, 73 (1971); *Cherry v. Wolfe,* 205 Pa. Super. 484, 488, 210 A.2d 917, 919 (1965).

If there was not a break in the negotiations then that must be clearly alleged.

Van Mater's contention that the underlying information concerning its contacts with Tom Beck is available through discovery is not tenable.

[6] Plaintiff's Complaint, paragraph 9.
[7] Plaintiff's Complaint, paragraph 14.

"As long as fact pleading exists in Pennsylvania we will require that pleadings conform to the rules and do not see the availability of discovery proceedings as a reason to relax pleading standards." *Cullings,* supra at 770.

Van Mater's complaint needs substantial revision if it is to state a cause of action. There must be allegations, with a factual basis, regarding what contractual authority it was operating under in its attempt to sell the property after April 18, 1984; that there was "no break in the chain of causation" between the initial contact with Tom Beck and the subsequent sale to Welty Associates; and that there was no break in the negotiations.

ORDER OF COURT

September 9, 1985, the demurrer and motion for a more specific pleading of Sylvania Shoe Manufacturing Corporation, defendant, are sustained. Van Mater Real Estate Services Company, Inc., plaintiff, is granted leave to file an amended complaint within twenty (20) days.

FRANKLIN PROPERTIES V. TOWNSHIP OF ST. THOMAS, ET AL., C.P. Franklin County Branch, Equity Docket Volume 7, Page 389

ST. THOMAS CONCERNED CITIZENS GROUP V. TOWNSHIP OF ST. THOMAS, ET AL., C.P. Franklin County Branch, Equity Docket Volume 7, Page 393.

Construction of Sewer - 2nd Class Township Code - Municipalities Authorities Act - Equal Protection - Abuse of Discretion

1. Where a municipal authority is building a sewer, a township which guarantees payment on an authorities debt or paying interest on the debt is not so involved in the project so as to cause the project to be governed by the Second Class Township Code.

2. An agreement to pledge a township's full faith and credit, its taxing power and to guarantee an authority's note is proper under §66504 of the 2nd Class Township Code.

3. The fact that some sewers may be built by townships and the people have a veto, and others may be built by authorities and the people do not have a veto is not a violation of the equal protection clause of the U.S. Constitution.