McConnellsburg (Bank). The note contained a confession of judgment clause and the Bank entered judgment on the note the same day it was executed, creating a lien on the property of Peck and Jones.

After Peck and Jones defaulted, the Bank filed a Complaint in Confession of Judgment on April 7, 1981, issued execution on May 12, 1981 and directed the Fulton County Sheriff to levy on their real property. On June 5, 1981 Peck and Jones Petitioned to Set Aside the Levy or Stay the Execution. We issued a temporary stay and a rule to show cause why the execution should not be set aside. The Bank answered and we heard argument.

We agree with Peck and Jones that the Bank's filing a Complaint in Confession of Judgment and then executing was improper. Section 407 of the Act of 1974, Jan. 30, P.L. 13, No. 6, 41 P.S. Sec. 407 restricts the right of a plaintiff to levy or execute on residential real property of a debtor solely on the basis of a confessed judgment. The plaintiff must file an appropriate action and proceed to judgment and decree against defendant as in any original action. Pa. R.C.P. 2981-2986 indicate that plaintiff must proceed conforming to an action in assumpsit.

Because the statutory procedure was not followed, the writ of execution and levy upon the real estate of Peck and Jones was untimely and improper. Under Sec. 407 (a) of the Act of 1974, supra, when a judgment has been obtained in conformance with actions in assumpsit, the new judgment merges with the confessed judgment, the confessed judgment is then conformed as to amount to the new judgment, and plaintiff may execute on the confessed judgment. This procedure not having been followed, the stay of execution will be continued pending final outcome of the matter.[1].

Peck and Jones have requested attorney's fees. We dismiss the claim. The statute entitles any debtor who prevails in any action to enforce a judgment entered by confession to recover

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[1] June 1, 1981 the Bank filed a Complaint required by Sec. 407 of the Act of 1974, supra. Peck and Jones filed an Answer Containing New Matter and Counter Claim and the Bank filed a Reply to New Matter. It appears the Bank is now proceeding in the appropriate way. Depending on the outcome, execution against the property of Peck and Jones may be proper.

reasonable attorney's fees and costs as determined by the court. The general rule is that attorney's fees can only be taxed when shown to have been actually charged to or paid by the party seeking to recover them. 20 Am Jur 2d Costs pgs. 58, 59, Sec. 72. Here no fees were shown to have been charged to or paid by Peck and Jones because they are represented without charge by Legal Services, Inc. Nor was there any evidence offered regarding such attorney's fees.

The statutory authority to award attorney's fees is valuable in deterring abuses, but we do not believe this situation is one in which attorney's fees should be awarded for punitive reasons. The Bank's actions, though erroneous, were not taken in bad faith, no substantial harm was done and the case is now proceeding properly.

ORDER OF COURT

January 18, 1982, IT IS ORDERED that Temporary Stay of Execution is continued until the outcome of the Bank's current action apparently conforming to law is established. The request of Peck and Jones for an award of attorney's fees is denied. Costs incidentall to this part of the proceeding shall be paid by the Bank. All other costs shall abide the event.

LUTMAN v. GSELL, C.P. Franklin County Branch, A.D. 1981 - 232

Assumpsit - Brokerage Contract - Right to Commission - Preliminary Objection.

1. A broker's right to commission generally accrues as soon as he presents a purchaser ready, willing and able to purchase the property upon the agreed terms.

2. Upon the procurement of a ready, willing and able buyer, sale is treated as constructively consummated.

3. The parties to a brokerage contract may specifiy in the contract at what point in a real estate transaction the broker earns his commission.

Harvey C. Bridgers, Esq., Attorney for Defendant

Gregory L. Kiersz, Esq., Attorney for Plaintiff

OPINION AND ORDER

EPPINGER, P.J., January 26, 1982:

Defendant Robert B. Gsell (Gsell) employed Plaintiff Jeanne L. Lutman, t.d.b.a. J. L. Lutman Real Estate (Lutman), a licensed real estate broker, to obtain a purchaser for a property. In the brokerage contract Gsell agreed to pay Lutman a commission of eight (8%) percent of the sale price of the premises which was listed at $125,000.00.

Lutman filed a complaint in assumpsit for a commission of $10,000.00 plus interest and costs of suit alleging, among other things, that her agent presented Gsell with an offer by prospective purchasers to purchase the property at the listed purchase price. Attached to the complaint are copies of the prospective purchasers' offer to buy the property and their bank draft for a down payment at $5,000.00. Lutman also alleges that Gsell refused the offer to purchase, refused to execute the agreement of sale. Lutman alleges she, therefore, had procured buyers who were ready, willing and able to purchase the real estate at the listed price and the failure to sell was no fault of the broker or the purchasers.

Gsell demurred to the complaint, charging that it failed to state a cause of action because it alleged only an offer to buy and not a sale of the real estate effected by Lutman. This Preliminary Objection is now before us.

The language of the parties' contract is:

> "I agree that if said property is sold or exchanged during the term of the said agency, WHETHER EFFECTED BY WHOMSOEVER INCLUDING MYSELF THE OWNER, I will pay you a commission as specified. . ." (Emphasis original.)

However, a broker's right to his commission generally accrues as soon as he presents a purchaser ready, willing and able to purchase the property upon the agreed terms. *Herr v. Stumpf*, 60 Lanc.Rev. 33 (1965); *Stevenson v. Bannan*, 235 Pa. 512, 84 A. 447 (1912); *Speer v. Benedum-Trees Oil Co.*, 239 Pa. 180, 86 A. 695 (1913). If this is done, it is immaterial (as far as the broker's commission is concerned) that the seller subsequently refuses to consummate the sale. *Schamberg v. Kahn*, 279 Pa. 477, 124 A. 138 (1924);

Hambleton v. Selden, 163 Pa. Super. 259, 60 A.2d 369 (1948).

> "A promise to pay a commission if the broker 'effects a sale' or 'negotiates a sale' ordinarily subjects the principal to liability not only if a transfer of title is effected but also if an enforceable contract of sale is executed or if a suitable customer is produced who is ready, willing and able to execute such a contract." *Andrien v. Bennett*, 191 Pa. Super. 150, 155 A.2d 206 (1959), *quoting* Restatement, Agency 2d, Sec. 445(e).

Upon the procurement of a ready, willing and able buyer, sale is treated as constructively consummated. *Shumaker v. Lear*, 235 Pa. Super. 509, 345 A.2d 249 (1975). And if the seller, by his own actions, is responsible for his failure to receive the purchase price, he cannot take advantage of his own wrong doing to escape liability for the broker's commission. *Herr v. Stumpf*, supra, citing cases.

While it is true that the parties to a brokerage contract may take themselves out of the ordinary rule that a broker earns his commission by producing a purchaser ready, willing and able to buy on terms satisfactory to the vendor by providing otherwise in the contract, whether these parties did presents a question of contract interpretation to be determined at trial and not at the preliminary objection stage.

In ruling on a demurrer, we are required, at this point, to construe all doubts in favor of the plaintiff. *Strock v. York Bank and Trust Co.*, 94 York L.R. 105 (C.P., 1980). A demurrer should only be sustained in clear cases where it is certain there can be no recovery. 2 Goodrich-Amram 2d Sec. 1017(b):11; *Pike Co. Hotels Corp. v. Kiefer*, 262 Pa. Super. 126, 396 A.2d 677 (1978).

We believe Plaintiff's complaint as stated adequately sets forth a cause of action against Defendant. Accordingly, Defendant's demurrer is overruled and Defendant is given twenty days to respond to the complaint.

ORDER OF COURT

January 26, 1982, the demurrer is overruled. The Defendant is granted twenty (20) days from this date to file an Answer to the Complaint.

DIEHL v. REED, C.P. Franklin County Branch, No. 298 of 1980-C

Equity - Judgment on the Pleadings - Pa. R.C.P. 1029(c)

1. A motion for judgment on the pleadings shall not be granted unless the case is clear and free from doubt and there are no facts contraverted or in dispute.

2. Where Plaintiff's denial of Defendant's new matter used the exact language of Pa. R.D.P. 1029(c), the denial is not an admission in that Plaintiff's are entitled to ask for proof of a property's status as unenclosed woodlands.

James M. Schall, Esq., Counsel for Plaintiffs

Ronald Keeler, Esq., Counsel for Defendants

OPINION AND ORDER

KELLER, J., January 29, 1982:

This case was commenced by Plaintiffs' filing of a Complaint in equity on September 30, 1980. Defendants' Answer with New Matter was filed on October 22, 1980, the Plaintiffs' Reply followed on December 24, 1980. Defendants' Motion for Judgment on the Pleadings was served by mail on November 2, 1981, and the matter was listed for argument. Counsel for both sides presented their arguments to the Court on December 22, 1981, and the matter is now ripe for disposition.

It has long been the rule in this Commonwealth that judgment shall not be entered on a motion for judgment on the pleadings unless the case is clear and free from doubt, *Vrabel v. Scholler*, 369 Pa. 235 (1952), and only where there are no facts contraverted or in dispute. *Richards v. Schuylkill County*, 399 Pa. 552 (1960) and *Potts Manufacturing Company v. Loffredo*, 235 Pa. Super. 294 (1975).

The defendants contend in support of their motion that plaintiffs should be deemed to have admitted paragraphs 12, 13 and 14 of their new matter due to the evasive answers given in their reply, and therefore no factual disputes exist. In each of these three paragraphs, plaintiffs have specifically denied defendants' corresponding allegations "for the reason that the means of proof are within the exclusive control of the defendants and proof thereof is demanded." This is the exact language suggested by Pa. R.C.P. 1029(c). Although plaintiffs are obviously familiar with defendants' lands since they are pre-