IN THE COURT OF APPEALS OF IOWA

No. 5-226 / 94-1077

LAKE REALTY, INC., d/b/a LAKE PARTNERS REAL ESTATE; and NAOMI RAYHONS, d/b/a NAOMI'S REALTY,
Plaintiffs-Appellees,

FILED
AUG 17 1995
CLERK SUPREME COURT

vs.

MARK GRAVES and MAVA GRAVES,
Defendants-Appellants.

Appeal from the Iowa District Court for Cerro Gordo County, Jon Stuart Scoles, Judge.

Mark and Mava Graves challenge the district court order finding Lake Realty was entitled to a commission for the sale of certain real estate. **AFFIRMED.**

Gregory C. Nicholas and Rick Loftsgard of Pappajohn, Shriver, Eide & Nicholas, P.C., Mason City, for appellants.

Charles H. Biebesheimer of Stillman, Goranson, Stone & Lovell, Clear Lake, for appellees.

Considered by Hayden, P.J., Huitink, J., and Perkins, S.J.*

*Senior Judge from the Fifth Judicial District serving on this court by order of the Iowa Supreme Court.

PERKINS, S.J.,

On January 11, 1992, Mark and Mava Graves entered into a contract with Lake Realty, Inc., doing business as Lake Partners Real Estate, which gave Lake Partners the exclusive right to sell the Graves' real estate in Ventura, Iowa. The property included a lake-front lot with a house (Lot 4), two unimproved lake-front lots (Lots 5 and 6), and an undivided interest in a well and out lots. The listing price for this property was $135,000. The listing agent was Jeanne Aastrup, a sales associate with Lake Partners. On March 15, 1992, the parties entered into an extension agreement, which was to expire on September 17, 1992.

John and Jacqueline Rockwood were interested in buying a house on Clear Lake. They contacted Naomi's Realty and Richard Gourley, an agent from that office, showed the Graves' property to the Rockwoods on two occasions during the summer of 1992. He also took the Rockwoods on one or two drive-by viewings of the house. He testified the Rockwoods were very interested in the house.

After discussions with Naomi Rayhons, owner of Naomi's Realty, the Rockwoods decided they could not spend more than $100,000 for a house. The Rockwoods asked Rayhons if it would be possible for them to buy the property, excluding Lots 5 and 6, for around $100,000. Rayhons contacted Aastrup, who in turn contacted the Graves, to present this proposal. The Graves told Aastrup they would not be willing to sell only a portion of the property listed.

On August 7, 1992, the Graves came to Aastrup's office and told her they wished to take their home off the market. Although Aastrup did not actively try to sell the house after that date, she stated the listing agreement continued in effect until September 17, 1992, the date found in the contract.

On August 29, 1992, Aastrup sent a protection letter to the Graves which set forth the prospects to whom the property had been presented while listed with Lake Partners. Lake Partners stated a commission would be due if a sale was made to any of these prospects within 180 days of the expiration of the listing. The Rockwoods were included within the identified prospects.

In December 1992, the Graves sold Lot 4 and an undivided interest in the well and out lots to the Rockwoods for $106,500. Lake Partners asked the Graves to pay it a sales commission and the Graves refused. Lake Partners and Naomi's Realty filed the present suit, claiming the Graves had breached their contract by failing to pay the commission due on the sale.

The Graves raised four reasons why they believed they were not required to pay a commission: (1) the listing contract was defective because it failed to identify a definite protection period; (2) the protection clause was unenforceable because Lake Partners failed to send the protection letter by certified mail; (3) less than all of the listed property was sold; and (4) Lake Partners was not entitled to a commission under the terms of the listing agreement. The district court found against the Graves on each of these grounds. The court found that because the Graves' contract was with

Lake Partners, and not Naomi's Realty, only Lake Partners was entitled to recovery from the Graves. The court entered judgment against the Graves for $7,455, plus interest. The Graves appealed.

I. This action was tried at law, and our review is for the correction of errors of law. Iowa R. App. P. 4.

The findings of fact in a law action have the effect of a special jury verdict and are binding on us if supported by substantial evidence. *PEB Practice Sales, Inc. v. Wright*, 473 N.W.2d 624, 626 (Iowa App. 1991). Evidence is substantial or sufficient when a reasonable mind would accept it as adequate to reach the same findings. *Id.* In case of doubt or ambiguity we construe the findings to uphold, rather than defeat, the trial court's judgment. *Id.*

II. Defendants contend the district court erred in finding Lake Partners was entitled to a commission under the listing agreement. It first points out that the entire listed property was not sold to the Rockwoods. The property which was sold did not include Lots 5 and 6. The Graves state the listing agreement did not provide that a commission would be due if only a portion of the listed property were sold.

A realtor's commission may be earned in three ways: (1) by effecting a binding contract of sale under authority given to the agent to make such a contract for the principal; (2) by producing a purchaser to whom a sale is in fact made; or (3) by producing a purchaser ready, willing and able to buy on terms specified in the agency agreement. *Gatton v. Stephen*, 239 N.W.2d 159, 161 (Iowa 1976). In this case, Lake

Partners is basing its claim to a commission on the production of a purchaser to whom a sale was in fact made.

Where a broker is the procuring cause of a contract concluded by the principal with a customer produced by the broker, and any special conditions attached to the right to a commission have been fulfilled or waived, the fact that the contract so concluded differs in price or terms from which the broker was authorized to negotiate does not deprive the broker of his or her right to a commission. *Morton v. Drichel*, 237 Iowa 1209, 1211, 24 N.W.2d 812, 813 (1946).

The district court noted that if a seller was not required to pay a commission on the sale of a portion of the listed property, the seller would obtain a substantial benefit from the agreement without payment of the agreed compensation. The court concluded that if a portion of the property is sold, then the listing agreement would entitle the broker to receive a commission on that portion of the property which is sold. We concur in the district court's reasoning. Under the facts presented here, we determine the seller is not excused from paying a commission due to the fact that only a portion of the listed property was sold.

III. The Graves raise an argument that Lake Partners breached the terms of the contract by sending the protection letter by regular mail instead of by certified mail. They claim that because Lake Partners breached the contract, they are not required to comply with the contract by paying a commission.

The listing agreement required that a protection letter be delivered in person or by certified mail. Aastrup admitted she sent the protection letter by regular mail instead of certified mail. She testified that the defendants admitted receiving the protection letter, but they refused to sign and return it.

Where a party has substantially performed its end of the bargain, a court will not void or rescind a contract for breach where the breach is not material. *Agri Careers, Inc. v. Jepsen*, 463 N.W.2d 93, 95-96 (Iowa App. 1990). Here, the district court found Lake Partners had substantially complied with the contract. The court concluded sending the protection letter by certified mail was not a material part of the agreement and should not serve to invalidate the essence of the contract when the defendant is unable to point to actual prejudice.

We find substantial evidence in the record to support the court's finding that the Graves actually received the protection letter. We affirm the court's conclusion that Lake Partners substantially complied with the listing agreement by sending the letter by regular mail.

IV. Defendants claim Lake Partners is not entitled to a commission because it did not have negotiations with the ultimate purchaser of the property. The listing agreement provided the owner agreed to pay a commission:

> IF PROPERTY IS SOLD, CONVEYED OR OTHERWISE TRANSFERRED WITHIN 180 AFTER THE TERMINATION OF THIS AUTHORITY OR ANY EXTENSION THEREOF TO ANYONE WITH WHOM AGENT HAS HAD NEGOTIATIONS PRIOR TO FINAL TERMINATION . . .

The Graves claim there was no discussion of terms or bargaining between Lake Partners and the Rockwoods prior to the termination of the listing agreement, and therefore, Lake Partners is not entitled to a commission.

"Negotiation" is a broad term with many meanings and connotations. *Vint v. Ashland*, 258 Iowa 591, 594, 139 N.W.2d 457, 459 (1966). In *Vint* the supreme court approved a jury instruction which provided that when used in an exclusive listing contract, "negotiated" means:

> that the efforts of the broker, in his dealings with a prospective purchaser, whether through telephone conversations, letters or other communications, must be such that the interest of the prospective purchaser is created or aroused to the point that the prospective purchaser would be considered a likely purchaser at the time of the termination of the listing contract.

Id. at 593, 139 N.W.2d at 459. Whether a prospect would be considered a likely purchaser is ordinarily a fact question. *Id.* at 596, 139 N.W.2d at 160.

We find there is substantial evidence in the record to support a finding the Rockwoods could be considered likely purchasers. The evidence showed the Rockwoods looked at the property several times and were very interested in purchasing it. We find Lake Partners negotiated with the Rockwoods by communicating with them concerning the request to purchase a portion of the listed property. We affirm the district court's conclusion that Lake Partners sufficiently negotiated with the Rockwoods to entitle it to a commission on the sale of the property to the Rockwoods.

V. Finally, defendants claim Lake Partners is not entitled to a commission because the listing agreement did not provide for a definite protection period. A Real Estate Commission rule provides that for a protective clause to be enforceable, it must establish a definite protection period. Iowa Administrative Code §193E-1.19 (543B).

As seen from the quotation from the listing agreement in the section above, the listing agreement provided a commission was due if the property was "transferred within 180 after the termination of this authority." Aastrup testified the provision meant 180 days, and the word "days" had been inadvertently omitted.

The district court concluded that because the listing agreement failed to state a unit of time, parol evidence was admissible on this issue. We agree with this conclusion. While parol evidence is not admissible to show what the parties meant to say, it is admissible to show what the parties meant by what was said. *Bankers Trust Co. v. Woltz*, 326 N.W.2d 274, 276 (Iowa 1982). In the present case, parol evidence was used to show what was meant by the term "180".

We affirm the district court's conclusion that the listing agreement sufficiently established a definite protection period and that the parties intended the protection clause to extend for a period of 180 days.

After considering all issues raised in this appeal, we affirm the decision of the district court. Costs of this appeal are assessed to defendants.

AFFIRMED.