

IN THE IOWA COURT OF APPEALS

PETER TAKOS, JR., AND WENDALL MC FARLAND,
d/b/a TAKOS REALTY,)

Filed May 26, 1981

Plaintiffs-Appellees)

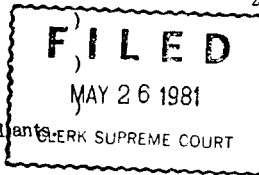
)

vs.

0-376
2-62140

RALPH W. WELCHMAN AND
BONNIE J. WELCHMAN,

Defendants-Appellants)
CLERK SUPREME COURT



Appeal from Cedar District Court - Max Werling, Judge.

Defendants appeal judgment for plaintiffs in action for real estate broker's commission. - REVERSED AND REMANDED.

Ralph W. Welchman, Moody, Mo., pro se.

John Donohoe, of Vollertsen & Britt, Davenport, for plaintiffs-appellee.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

PER CURIAM

Defendant, representing himself pro se, appeals from a judgment for plaintiff-broker in an action for a real estate broker's commission. We reverse and remand.

On August 23, 1976, the parties entered into a brokerage agreement for the sale of the Ralph and Bonnie Welchman farm at a price of \$124,300. In early November, 1976, plaintiff presented defendant with a written offer to purchase his farm for \$124,300. The offer states that the farm being purchased consists of 113 acres, more or less. Defendant declined the offer. Plaintiff filed a petition for his brokerage fee on March 1, 1977. The petition alleges that defendant owns a 113 acre farm and that the brokerage agreement provided for its sale at \$1100 per acre. Defendant's answer denied all allegations of plaintiff's petition and asserted affirmative defenses of fraud and misrepresentation. Plaintiff moved for summary judgment, and the trial court granted the motion with respect to all affirmative allegations in plaintiff's petition, leaving only the affirmative defenses of fraud and misrepresentation to be determined at trial. Plaintiff then moved for summary judgment on the defenses of fraud and misrepresentation. Defendant's counsel withdrew from the case at defendant's request, and in resistance to plaintiff's motion, defendant stated that fraud and misrepresentation were erroneously pled as affirmative defenses. Defendant stated that his real defense is based on the fact that he could not accept the offer to buy his farm because of an inaccuracy in the contract's statement of how many acres were being purchased. The trial court overruled plaintiff's motion, the case went to trial, and plaintiff was awarded a judgment of \$7,458.

Our scope of review is limited to correction of errors at law. Iowa R. App. P. 4. The trial court's findings of fact are binding on this court if supported by substantial evidence. Knauss v. Kemin Industries, Inc., 267 N.W.2d 56, 57 (Iowa 1978); Carson v. Mulnix, 263 N.W.2d 701, 705 (Iowa 1978); Iowa R. App. P. 14(f)(7). We are not, however bound by the trial court's determinations of law. Warder & Lee Elevator, Inc. v. Britten, 274 N.W.2d 339, 340 (Iowa 1979).

The trial court erred in granting plaintiff's first motion for summary judgment with respect to all of plaintiff's affirmative allegations in his petition. Summary judgment is appropriate only when the moving party shows that there exist no material issues of fact and that it is entitled to judgment as a matter of law. In re Eickman

Estate, 291 N.W.2d 308, 311 (Iowa 1980); Anita Valley, Inc. v. Bingley, 279 N.W.2d 37, 40 (Iowa 1979); City of Eldridge v. Caterpillar Tractor Co., 270 N.W.2d 637, 640 (Iowa 1978). The burden of showing absence of any genuine issue of material fact is on the summary judgment movant. Schulte v. Mauer, 219 N.W. 2d 496, 500 (Iowa 1974). In considering such a motion, a court is required to examine the record in the light most favorable to the party opposing the motion to determine whether the movant has met his burden. Anita Valley, Inc., 279 N.W.2d at 40; Iowa Department of Transportation v. Read, 262 N.W.2d 533, 536 (Iowa 1978). If reasonable persons could draw different inferences and conclusions from the undisputed facts, summary judgment is not proper. In re Eickman Estate, 291 N.W.2d at 311-312; Daboll v. Hoden, 222 N.W.2d 717, 733-34 (Iowa 1974). In ruling on a motion for summary judgment, the trial court and this court on review must examine the entire record before it, including pleadings, admissions, depositions, answers to interrogatories, affidavits, and testimony. Meylor v. Brown, 281 N.W.2d 632, 634 (Iowa 1979); Frohwein v. Haesemeyer, 264 N.W.2d 792, 795-96 (Iowa 1978); Brody v. Ruby, 267 N.W.2d 902, 904 (Iowa 1978). If, under these principles, an examination of the record discloses any allegations of ultimate fact which, if found true, would constitute a good defense to the action, a summary judgment must be overruled. Schulte, 219 N.W.2d at 500.

When a real estate broker undertakes to find a purchaser who shall buy on specified terms and conditions, he is entitled to his commission when he produces a purchaser who is ready, willing, and able to buy on the terms and conditions proposed, even though the owner refuses to enter into any binding contract with the proposed purchaser. White v. Miller, 259 Iowa 609, 615, 145 N.W.2d 28,32 (1966). However, if a broker procures a buyer on terms not authorized or materially different from those contemplated in the brokerage agreement and the owner will not sell his property under those unauthorized or different terms, the broker is not entitled to a commission. See Star Realty v. Strahl, 261 Iowa 362, 365, 154 N.W.2d 143, 145 (1967); Iowa Securities Co. v. Schaefer, 256 Iowa 219-25, 126 N.W.2d 922, 925 (1964); McCulloch Investment Co. v. Spencer, 246 Iowa 433, 437, 67 N.W.2d 924, 926 (1955).

In its grant of plaintiff's first motion for summary judgment, the trial court found that the allegations of plaintiffs' petition were proved without further proof at the time of trial excepting only the affirmative defense of whether plaintiffs were guilty of

fraud and misrepresentation as to actual value. Plaintiffs attached Exhibit A, the brokerage agreement, to their motion for summary judgment. Exhibit A contains nothing concerning the number of acres of realty defendant intended to sell for \$124,300. Beyond bare allegations, plaintiff provided no evidence whatever in the documents attached to his motion that the brokerage agreement provided for the sale of 113 acres of realty.

Defendant denied that the brokerage agreement provided for the sale of 113 acres of realty. Exhibit B, which is a copy of the offer to purchase agreement, was incorporated by plaintiffs in their motion for summary judgment. In exhibit B the purchaser offers to purchase defendant's farm and following the legal description states: "Purchase consists of 113 acres M.O.L. at \$1100 per acre situated in the County of Cedar and State of Iowa for the total sum of dollars \$124,300." On its face it is not clear whether this offer is to purchase the farm for a lump sum or by the acre. If the offer is to purchase 113 acres of realty more or less rather than the farm, regardless of size, for a sum certain, then the offer to buy procured by plaintiff materially deviated from the terms of the brokerage agreement and plaintiff was not entitled to his commission.

Defendant testified at trial that he refused to accept the buyer's offer because he did not have 113 acres of realty to sell. In rendering judgment for plaintiff in its conclusions of law the trial court stated that the issues were settled by the ruling on summary judgment but for fraud and misrepresentation. The court then found that no evidence of fraud or misrepresentation was offered and therefore it was "without any other choice but to render judgment as prayed." The issue of whether plaintiff has procured an offer that meets the terms of the brokerage agreement should be resolved at trial. Since the record on the motion for summary judgment discloses that there was a material issue concerning the acreage to be sold under the brokerage agreement, the trial court erred in its ruling on the motion for summary judgment.

REVERSED AND REMANDED.