

**FILED**

**MAR 20 1984**

**CLERK SUPREME COURT**

**IN THE COURT OF APPEALS OF IOWA**

**LUNDSTROM REALTY, INC.,**

)

Plaintiff-Appellant,

)

vs.

)

**VINCENT E. VANDERAH d/b/a  
VANDERAH REALTY,**

)

)

Defendant-Appellee.

Filed March 20, 1984

79

4-03  
2-68865

---

Appeal from the Iowa District Court for Polk County - Richard A. Strickler,  
Judge

Plaintiff appeals from a judgment for defendant in an action for an  
accounting involving a dispute over a real estate commission. **AFFIRMED.**

R J. Wagener of the Wagener Law Firm, Ankeny, Iowa, for plaintiff-  
appellant.

Robert E. Dreher of Dreher, Wilson, Adams & Jensen, Des Moines, Iowa, for  
defendant-appellee.

Heard by Schlegel, P.J., and Hayden and Sackett, JJ.

Plaintiff, Lundstrom Realty, Inc., appeals from a judgment for defendant, Vincent Vanderah, in an action for an accounting involving a dispute over a real estate commission. The issue is which of the parties, both real estate agents, are entitled to the monies paid to the defendant as a commission for the sale of certain real estate. We hold that the defendant is entitled to retain the monies because the plaintiff has not sustained its burden to show that it has a right to an accounting.

On March 22, 1978, the four owners of an undeveloped lot in Ankeny, Iowa, gave Vanderah a written real estate listing. This listing agreement was to expire by its terms on June 30, 1978. The listing was never extended in writing. Vanderah, by agreement with one of the four owners, Thomas Harkin, continued his attempts to sell the property. Vanderah considered Harkin the family spokesperson. Mr. Harkin would periodically check with Vanderah concerning his progress in attempting to sell the property.

In March of 1980, United Contractors, Inc., contacted Vanderah and expressed interest in the property. United Contractors indicated to Vanderah on March 24, 1980, that they intended to make an offer for the property. United Contractors made a written offer to Thomas Harkin on April 2, 1980, and, until the eventual closing, were engaged in continuous negotiations with Harkin for the sale of the property.

The four owners of the real estate executed a written listing agreement with Lundstrom Realty on March 26, 1980. A real estate salesperson employed by Lundstrom contacted Vanderah on March 28, 1980, to ask Vanderah to remove his sign from the property. After being informed of the listing, Vanderah requested and received "protection" on three prospective purchasers, including United Contractors. Vanderah contacted Thomas Harkin the next day by telephone and repeated his request for "protection." Vanderah subsequently sent Harkin a letter

on March 31, 1980, containing his request for "protection" for the three prospective buyers. Vanderah sent a copy of this letter to Lundstrom. The 1978 written listing agreement between Vanderah and Harkin provided that Vanderah would be entitled to a sales commission:

[I]f said property is sold by the owner within six months after the termination of this contract, or any extensions thereof, to any buyer to whom the property has been presented or to any buyer who has inspected the property during the term of this contract, or any extensions thereof.

Conflicting testimony was presented at trial as to the meaning of "protection." Plaintiff's salesperson testified that she believed it meant that the parties would each receive fifty percent of the commission; and Vanderah testified that he believed that if the property was sold to one of the three prospective buyers, he would receive the entire commission. There was also conflicting testimony presented at trial as to the amount of involvement Lundstrom had in the sale of the property. It is clear, however, that Lundstrom had no contact with United Contractors throughout the negotiations and that the closing was conducted in Vanderah's real estate office.

Sometime during the negotiation process the sellers became concerned about the possibility of paying two real estate sales commissions. Vanderah and Lundstrom signed an agreement that only one five percent commission would be charged for the sale of the property. There was, however, no agreement between the parties how the commission would be split.

I. Scope of Review. The action was brought and tried without objection as an action for accounting. Neither party challenged the trial court's exercise of equity jurisdiction on appeal. See Kreamer v. College of Osteopathic Medicine and Surgery, 301 N.W.2d 698, 699-700 (Iowa 1981); Berry Seed Company v. Hutchings, 247 Iowa 417, 422-23, 74 N.W.2d 233, 236-37 (1956). An action at law for money had and received may have been more appropriate in this case. However, because this issue was not raised, we review the case as tried below.

Atlantic Veneer Corporation v. Sears, 232 N.W.2d 499, 502 (Iowa 1975). Our review in equity is *de novo*. Iowa R. App. P. 4. We give weight to the fact findings of the trial court, but are not bound by them. Iowa R. App. P. 14(f)(7).

II. Violation of Iowa Real Estate Commission Rules. Lundstrom asserts on appeal that Vanderah's listing agreement was ineffective at the time he procured the buyer because the listing agreement was not in writing as required by Iowa Real Estate Commission Rule L23, that the defendant may not recover under a theory of quantum meruit when the listing agreement is in violation of Iowa Real Estate Commission Rule L23, and that the letter listing "protected" customers was ineffective because it violated Iowa Real Estate Commission Rule L19 by not being sent to the seller before the listing expired. In response, Vanderah asserts that Lundstrom is not entitled to raise the Iowa Real Estate Commission Rule L23 issue because the rule is intended to protect customers, not brokers. Vanderah also asserts that, in any case, the issue was not preserved for appeal.

During the trial, counsel for plaintiff asked witnesses about the Real Estate Commission Rules and had the witnesses read both rules involved here into the record from a Real Estate Manual issued by the Iowa Real Estate Commission. However, the plaintiff did not rely on a violation of the Iowa Real Estate Commission Rules in its posttrial memorandum. The manual was also introduced into evidence as an exhibit by the plaintiff. The trial court did not mention the Real Estate Commission Rules in its decision and no Iowa Rule of Civil Procedure 179(b) motion was filed asking the court to rule on the issues presented. The supreme court in Arnold v. Lang, 259 N.W.2d 749, 753 (Iowa 1977), stated as follows: "it is now well settled a rule 179(b) motion is essential to preservation of error when a trial court fails to resolve an issue, claim, defense or legal theory properly submitted for adjudication." Assuming the issues were properly submitted to the trial court, the plaintiff failed to preserve error as to the issues concerning violation of Iowa Real Estate Commission Rules. Therefore, the

supreme court's decision in Milholin v. Vorhies, 320 N.W.2d 552, 554-55 (Iowa 1982), holding that an oral listing agreement is unenforceable upon proper objection, is inapplicable in this case. We need not decide the issue of whether or not a real estate broker may assert a violation of Iowa Real Estate Commission Rule 1.23, as a bar to enforcement of an oral listing agreement by another real estate agent.

As to Lundstrom's assertion that Vanderah may not recover from the sellers under a theory of quantum meruit when the listing agreement is in violation of Iowa Real Estate Commission Rule 1.23, we agree that it is a correct statement of the law; however, we fail to see its applicability to this case. Vanderah's right to receive a real estate sales commission is based on an oral contract between Vanderah and Thomas Harkin, one of the owners of the property. See McHugh v. Johnson, 268 N.W.2d 225, 227 (Iowa 1978) (at common law a real estate agent is entitled to a brokerage commission on an oral listing contract once he has produced a buyer ready, willing, and able to buy, on terms acceptable to the one with whom he dealt).

III. Right to Accounting. The general rule is that the burden is upon one who claims a right to an accounting to prove such a right. Randolph Foods, Inc. v. McLaughlin, 253 Iowa 1258, 1265, 115 N.W.2d 868, 871 (1962). Lundstrom asserts that because of its exclusive written listing agreement which was in effect at the time of the sale, it is entitled to a commission. Lundstrom cites 12 C.J.S. Brokers section 175, p. 555 (1980), for the proposition that "a broker who has been granted either an exclusive agency or an exclusive right to sell or lease property is entitled to a commission, at least by way of damages, on a sale or lease by or through another broker during the existence of the first broker's exclusive agency or right." We do not quarrel with that proposition as a general statement of the law. It is, however, inapplicable to the present action for an accounting.

This is not an action involving the seller in a suit for a real estate commission. See Gaudio, The Iowa Law of Real Estate Brokerage, 30 Drake L.

Rev. 437, 472 n.259 (1980-81) (two separate commissions could be payable where one broker earns the commission as the procuring cause and another broker earns the commission as the listing broker). Nor is this a case in which one party has wrongfully received property which he had no right to. Because we have determined that the Iowa Real Estate Commission Rules do not apply in this case, Vanderah's right to receive a real estate commission is controlled by the case of McHugh v. Johnson, 268 N.W.2d 225. The original contract, extended by oral agreement, permitted Vanderah to recover a real estate commission from the owner if the property was sold within six months to any buyer to whom the property had been presented during the term of the contract, or any extensions thereof. Under common law rules, an oral contract between owner and broker is valid. Id. at 227. Finally, as noted by the trial court, there was no agreement between the parties concerning the division of the commission. Absent this, Lundstrom has no right to enforce. Accordingly, we hold that Lundstrom has failed to show that it has a right to an accounting.

The decision of the trial court is affirmed.

AFFIRMED.