IN THE COURT OF APPEALS OF IOWA

No. 4-048 / 93-0245

RUHL & RUHL REALTORS, INC.,

Plaintiff-Appellee,

vs.

RALPH E. FORTMAN and
RUTH A. FORTMAN,

Defendants-Appellants.

Appeal from the Iowa District Court for Scott County, Bobbi M. Alpers, Judge.

The defendants appeal from the judgment awarding the plaintiff realtor a commission for the sale of commercial property to a lessee of the property. **AFFIRMED IN PART; REVERSED IN PART.**

Dennis D. Jasper of Stafne, Lewis, Jasper, Alexander & Preacher, Bettendorf, for appellant.

Rand S. Wonio of Lane & Waterman, Davenport, for appellee.

Heard by Donielson, C.J., and Sackett and Habhab, JJ.

SACKETT, J.

The question in this appeal is whether the trial court erred in ordering defendants-appellants Ralph E. Fortman and Ruth A. Fortman to pay a commission to plaintiff-appellee Ruhl & Ruhl Realtors, Inc. on the sale of commercial real estate owned by defendants and sold to Scott County and in denying the defendants' counterclaim against the plaintiff for breach of fiduciary duty.

We reverse and dismiss the claim against Ruth. We affirm the dismissal of Ruth's counterclaim. We affirm the judgment against Ralph and affirm the dismissal of the counterclaim.

Defendants Ralph and Ruth Fortman owned a commercial building and land in Davenport, Iowa.[1] Ralph wished to sell the property and Ralph alone signed a listing contract with plaintiff firm providing plaintiff the exclusive right to sell the property for $725,000 from April 1, 1990 to July 1, 1990. John Corelis was the listing broker. The property had not sold by July 1, 1990.

Corelis, after the listing agreement had expired, worked to lease the property to Scott County. Scott County

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1. The real estate located at 4715 Tremont, Davenport, Iowa, legally described in the initial real estate listing as Lots 8, 9, Park 53, First Addition to the City of Davenport was listed showing title to the property was in the name of Ralph E. and Ruth A. Fortman. A lease of April 1991 shows it to be owned by a corporation of which defendants were officers. However; the case was tried and decided as though defendants jointly owned the property.

wanted to lease a warehouse to store voting machines. On September 27, 1990, the Scott County Board of Supervisors approved a two-year lease on the property. Plaintiff prepared a written lease that was sent to Ralph and his attorney for review on October 4, 1990. The lease contained the following provision:

> In the event Tenant shall purchase the property from Owner prior to the expiration of this lease. Owner agrees to pay the Agent a sales commission of 6% of the sale price.

The lease also provided plaintiff receive $4437 for services in procuring the lease. A few days later, Corelis and another realtor with plaintiff organization, Marge Barnhart, went to Ralph's place of business to go over the lease and have him sign it. Ralph alone signed the lease even though his attorney had not yet reviewed it. Ruth did not sign the lease despite owning an interest in the property. The lease went back and forth between Ralph and Scott County over square footage and dollar amounts. Changes were made to the lease plaintiff originally prepared, and they were initialed. The provision for plaintiff to receive a commission if the building was sold to Scott County did not change during negotiations.

On September 27, 1990, the county board of supervisors passed a resolution approving a two-year lease of the facilities. By November 8, 1990, the terms of the lease were agreed upon and the Scott County Board approved the terms through resolution and the county became a tenant.

The lease with the county was to cover a period from November 1, 1990 through October 31, 1992. Plaintiff was paid the leasing commission. The lease with corrections prepared by plaintiff went into the county file as did the county's lease with defendants.

In April 1991, intending to use the property as a minimum security jail facility, Scott County bought the real estate. Plaintiff requested its commission and, when it was not forthcoming, this suit was filed and defendants counterclaimed for breach of fiduciary duty. The trial court, after hearing the evidence, concluded the contract that existed as of November 8, 1990, was a lease between defendants and Scott County as well as an agreement to pay plaintiff a commission for leasing the property and also to pay a commission if Scott County bought the property. The trial court determined John Corelis used his best efforts to sell defendants' property and, even after the property was leased to Scott County, continued to try and sell the property. The trial court entered judgment against both defendants for the commission finding, even though defendant Ruth Fortman did not sign the documents, she accepted rent from Scott County on the lease and plaintiff was paid a commission on leasing.

Defendants on appeal contend there was no consideration for the agreement to pay the real estate commission and the contract was not enforceable because plaintiff breached its duty to defendants.

The parties are in agreement that this case was tried at law, and we review for correction of errors of law, Iowa R. App. P. 4, and findings of fact are binding on us if supported by substantial evidence.

We first address the defendants' claim there was no consideration for the contract. Defendants appear to argue consideration failed because plaintiff did not have to do anything else to earn a commission. The trial court found the November 8th lease was a contract not only between defendants and the county but, also, between defendants and the plaintiff. The building was sold to Scott County for $695,000 in September 1991. A lack of consideration means no contract was ever formed. Johnson v. Dodgen, 451 N.W.2d 168, 172 (Iowa 1990). There was substantial evidence to support a finding Corelis's strategy was to lease to the county and have a greater opportunity of its being an ultimate purchaser and this strategy was relayed to Ralph when the lease was made. Where a contract contemplates the subsequent execution of another agreement, the promises made are supported by the consideration of the original contract. See Freese v. Town of Alburnett, 255 Iowa 1264, 1271, 125 N.W.2d 790, 794 (1964); Insurance Agents, Inc. v. Abel, 338 N.W.2d 531, 534 (Iowa App. 1983). There also is evidence the realtors attempted to negotiate a sale with the county during the leasing period. There is substantial evidence to support the trial court's finding the November

8, 1990, lease also created a contract with defendant John Fortman.

The record; however, is void of any evidence to support a finding Ruth agreed to the provisions, and the mere fact she accepted rent under the lease is no evidence she consented to and had knowledge of the provision for payment of a commission on sale. The burden is on plaintiff to prove the existence of a commission contract. See Kuehnle v. Schromen, 140 N.W.2d 188, 190 (Iowa 1966). We also note section 1.23 of the Iowa Administrative Code, chapter 7, in part, provides:

> All listing agreements shall be in writing, properly identifying the property and containing all of the terms and conditions under which the property is to be sold, including the price, the commission to be paid, the signatures of all parties concerned and a definite expiration date. It shall contain no provision requiring a party signing the listing to notify the broker of the listing party's intention to cancel the listing after such definite expiration date. (Emphasis supplied).

The purpose of this rule is for the protection of the public to establish fair dealing between parties, standardize the procedure and practices in the real estate business and to prevent fraud. See Buckingham v. Stille, 379 N.W.2d 30, 32 (Iowa App. 1985). We, therefore, modify the judgment to dismiss the petition as against Ruth.

Defendants' second issue is plaintiff breached its fiduciary duty to defendants thereby rendering the contract or obligation to pay a commission unenforceable. Defendants advance this issue both as a defense to the suit against them and as evidence to support their counterclaim. Their claim is the language in the lease securing plaintiff's commission on sale is unconscionable and plaintiff did nothing to further the sale of the property. We have found Ruth was not a party to the listing contract. Therefore, she has no claim for breach of the contract. The general rule is that one who is not a party to a contract cannot recover for its breach. Williams v. Hair Stadium, Inc., 334 N.W.2d 354, 355 (Iowa App. 1983).

The trial court found plaintiff did not breach its duty and denied the counterclaim reasoning plaintiff's realtors did not have greater involvement with the sale because the agent for Scott County was advised no real estate brokers would be involved in the sale. The court also found Corelis used his best efforts to procure a sale of the property. We recognize there is contrary evidence. However, there is substantial evidence to support the trial court's findings and, consequently, we are bound by them.

The more bothersome question is a letter written during the negotiations between the county and defendants written by Charles Ruhl, Jr., a third owner in Ruhl & Ruhl. Defendants contended the letter breached plaintiff's fiduciary duty. The relationship between realtor and vendor is confidential and fiduciary in nature; it requires an undivided loyalty and disclosure by the realtor. Menzel v. Morse, 362 N.W.2d 465, 474 (Iowa 1985). There is the necessity of a high degree of honesty and trust. Miller v. Iowa Real Estate Comm'n, 274 N.W.2d 288, 292 (Iowa 1979). The letter told the board he had spent considerable time considering a location of the próposed minimum security detention facility and felt there were better locations. He said he had reviewed the property evaluation for alternative jail facilities and was familiar with other alternatives the county considered for the facility, he found the study well done and the study clearly summarized the fact defendants' property was not the best place to locate the facility. He advanced his belief that other facilities would offer better long-term potential for the county.

The letter was a strong recommendation from the plaintiff firm to Scott County that it not buy the facility. The trial court found the letter had been sent and Ruhl did not know brokers from his company had listed the building for sale or had been responsible for leasing to Scott County. The trial court also found Ruhl testified had he known these facts, he would not have sent the letter as it clearly created a conflict of interest. The trial court made no further findings on this issue. Ruhl's failure to know what was going on in his own firm is not sufficient justification for the breach of his fiduciary duty. There is no showing defendant's position was prejudiced by the letter. Therefore, we affirm the trial court on this issue.

We reverse and dismiss the claim against Ruth. We affirm the dismissal of Ruth's counterclaim. We affirm the judgment against Ralph and affirm the dismissal of the counterclaim.

AFFIRMED IN PART; REVERSED IN PART.