FILED
JAN 31 1978
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

HUGH McHUGH,	)	
Appellee,	)	Filed January 31, 1978
vs.	)	
LEO JOHNSON,	)	374 2-59797
Appellant.	)	

Appeal from Woodbury District Court - George F. Davis, Judge.

Defendant appeals from an adverse judgment entered for plaintiff-real estate broker based upon a determination that plaintiff was entitled to recover a real estate commission. REVERSED.

Edwin A. Getscher, of Getscher, Redd & Gescher, of Hamburg, counsel for appellant.

James W. Redmond, of Gleysteen, Harper, Kunze, Eidsmoe & Heidman, of Sioux City, counsel for appellee.

Heard by Allbee, C. J., Donielson, Snell, Oxberger and Carter, JJ.

DONIELSON, J.

Defendant-Leo Johnson appeals from an adverse judgment entered for plaintiff-Hugh McHugh, a licensed real estate broker, which was based upon a determination that plaintiff was entitled to recover a $15,000 real estate commission from defendant even though the sale of the property in question was never consummated. Defendant contends on appeal that the evidence was insufficient to justify a finding that McHugh had been authorized to act on Johnson's behalf in attempting to procure a buyer for the property. He also asserts that the trial court erred in concluding as a matter of law that a real estate broker's right to receive his commission is not affected by the failure or refusal of the principal's spouse to join in the contract of sale where the property is held in joint tenancy. See generally Annot., 10 A.L.R.3d 665.

In his petition, McHugh alleged that he was entitled to recover from Leo Johnson and his wife, Darlene, [1] a $15,000 real estate commission because he had procured a ready, willing and able buyer, Bonny Graham, to purchase the Hidden Acres Golf Course on terms acceptable to the seller, Leo Johnson. See Gatton v. Stephen, 239 N.W.2d 159 (Iowa 1976). McHugh successfully argued below that he was entitled to the real estate commission even though Darlene, the joint owner of the property along with Leo, refused to agree to the sale as negotiated and agreed upon by her husband.

In this law action tried to the court, the findings of fact are binding upon us if supported by substantial evidence. Rule 14(f)(1), Rules of Appellate Procedure. In other words, the trial court's findings of fact having adequate evidentiary support shall not be set aside unless induced by an erroneous view of law. It follows, then, that we are not precluded from inquiring into the question whether, conceding the truth of a finding of a fact, the trial court applied erroneous rules of law which materially affect the decision. Mullenger v. Clause, 178 N.W.2d 420, 426 (Iowa 1970).

In the context of real estate transactions, the law is settled that the relation between a broker and his client or customer ordinarily is that of principal and agent, the broker being a special agent. Consequently, the law of agency governs their respective rights and liabilities. 12 C.J.S. Brokers § 11 (1938). A broker may act as agent for his customer only where he has been engaged to do so by a contract of appointment or

[1] Although both Leo and Darlene were parties-defendants in the original action, only Leo is a defendant on appeal because the trial court dismissed plaintiff's petition as to Darlene.

employment, which contract may be either express or implied. Id. § 12 at p. 32. The existence of such a contract is essential to the right of a broker to receive a commission, Reeve v. Shoemaker, 200 Iowa 983, 985, 205 N.W. 742 (1925), and the burden is on the broker to prove the existence of such a contract and the requisite agency relationship. Kuehnle v. Schromen, 258 Iowa 989, 991, 140 N.W.2d 188 (1966); 12 C.J.S. Brokers, supra, § 15.

Apparently, McHugh contends that he proved the existence of an oral or implied employment contract with Johnson. See Pickerell v. Griffith, 238 Iowa 1151, 1156-1161, 29 N.W.2d 588 (1947). Although the trial court did not explicitly find that such a contract did exist, such a finding is implicit in the court's conclusion that McHugh was entitled to receive the commission.

In response, defendant denies the existence of any such contract and argues that he neither listed the property with McHugh or any other broker nor contractually agreed in any other manner to permit McHugh to serve as his agent to procure a buyer for the real estate. The record confirms Johnson's assertion that the property was never listed with McHugh and also indicates that no written employment contract between plaintiff and defendant was ever executed. However, McHugh argues that various negotiations conducted with Johnson served to create an oral or implied contract between them, thereby empowering McHugh to act as Johnson's agent.

At the trial of this cause, McHugh testified that he was contacted by Bonny Graham about purchasing a golf course in the Sioux City area and that, after discussing the Hidden Acres Golf Course in particular, Graham asked McHugh to speak with the owner about a possible sale. On July 29, 1974, McHugh contacted Leo Johnson, who stated that he might be interested in selling the course. The record is clear that it was not Johnson who approached McHugh initially about the sale of his property; rather, McHugh went to him and stated he had a prospective buyer.

During his initial conversation with defendant, McHugh informed Johnson that he would get a 7 percent real estate commission and Johnson evidently agreed to these terms. However, the record also reflects that Johnson had a different interpretation of these terms than McHugh regarding who was to pay this commission. This apparent confusion is best reflected by the fact that Johnson told McHugh that he would have to get his commission from Graham.

After several negotiations and offers, Johnson agreed to sell the property for "$260,000 net." Graham indicated that he would pay no more than $275,000, and Graham signed an offer of $275,000 prepared by McHugh, which included a $15,000 real estate commission for McHugh and otherwise complied with defendant's requirements. Although Johnson and Graham subsequently signed the $275,000 purchase agreement, Darlene Johnson refused to do so, despite efforts by both plaintiff and defendant to obtain her consent to the sale.

Upon a review of the record, we conclude that substantial evidence did not exist upon which a finding could be based that McHugh had met his burden in establishing an employment contract and the terms thereof. However, even if we were to assume **arguendo** that a contract between the parties did exist, we would still be constrained to deny McHugh the commission because the record clearly establishes that McHugh was also the broker and agent of Graham from the inception of the negotiations. Consequently, if McHugh was contractually bound to represent Johnson as well, he would have been in the precarious position of attempting to represent both parties to the same transaction who have adverse and conflicting interests.

According to the law of agency, an agent cannot act as such for both parties to the same transaction, in the presence of conflicting interests, unless he acts with the knowledge and consent of both. Where an agent has acted in a dual agency role, the transaction is ordinarily voidable at the election of either principal. 3 C.J.S. Agency § 277 (1973); Popejoy v. Eastburn, 241 Iowa 747, 756, 41 N.W.2d 764 (1950); Murphy v. Brown, 252 Iowa 764, 770-771, 108 N.W.2d 353 (1961); Darling v. Nineteen-Eighty Corp., 176 N.W.2d 765, 768 (Iowa 1970). Where the agent purporting to act in a dual agency role is a real estate broker, he is precluded from recovering compensation from either principal unless both have knowledge of and consent to such a relationship. 12 C.J.S. Brokers, supra, §§ 43 and 70; Rasmussen v. Hansen, 176 Iowa 26, 27-34, 157 N.W. 154 (1916); Preston v. McClelland, 196 Iowa 13, 18-19, 193 N.W. 434 (1923); Bowers & King v. Roth, 189 Iowa 1264, 1265-1267, 179 N.W. 859 (1920).

Since the evidence does not indicate that Graham and Johnson had knowledge of any dual agency relationship or consented to it, McHugh is precluded from recovering a commission under this line of analysis as well. Our resolution of this issue makes consideration of the remaining one raised herein unnecessary. Therefore, the judgment of the district court is reversed.

REVERSED.