

FILED
MAR 22 1979
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

ROBERT J. MALLINGER and)
RAY OSWEILER,)

Plaintiffs-Appellees,)

Filed March 22, 1979

vs.)

LAVEL R. ABELL and)
CAROLYN L. ABELL,)

736
2-61631

Defendants-Appellants.)

Appeal from Keokuk District Court - Ira F. Morrison, Judge.

Defendants appeal from judgment of trial court awarding plaintiff realtors a commission on the sale of defendants' real estate. Affirmed.

Jonathan C. Wilson & Steven Nelson, of Des Moines, for appellants.

Garold F. Heslinga, of Oskaloosa, for appellees.

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

PER CURIAM

Defendants Lavel and Carolyn Abell appeal from an adverse ruling of the trial court in favor of plaintiffs Robert Mallinger and Ray Osweiler on plaintiffs' petition which sought to recover a real estate commission on the sale of a piece of property owned by defendants. We affirm.

The record reveals plaintiffs and defendants entered into an exclusive listing contract for the property in question which expired without notice on November 1, 1975. The listing contract provided that if defendants made a sale of the property within two months after the expiration of the listing to a buyer who was shown the property by plaintiffs during the term of the listing, plaintiffs would be entitled to the four percent commission on the sale. Defendant Lavel Abell declined to extend the listing after it expired, as suggested by Osweiler. Plaintiffs testified that Lavel Abell agreed to pay a commission if the property was sold by the realtors. Abell testified that he told them he would "make it right."

There is some contention as to when the ultimate buyers were shown the property and introduced to defendants. Plaintiffs claimed they made initial contact as early as August 1975; defendants claimed the buyers approached plaintiffs on their own initiative in late November. There is no dispute, however, that plaintiffs assisted in negotiations and drew at least one purchase offer for the buyers. The property was finally sold on March 23, 1976 to the original offerors, and this action for the commission followed.

I. Defendants first assert the trial court erred in overruling their motion for default against plaintiffs. At the time set for trial, plaintiffs failed to appear. The trial judge telephoned plaintiffs' counsel and found that he was involved in another trial and had inadvertently missed the trial date in this matter. In view of counsel's prior good record for timely appearances and his explanation for his absence, the trial court overruled defendants' motion for default. Plaintiffs' counsel paid the fees for counsel and witnesses who had appeared for the defendants.

It has consistently been held the question of allowing default is largely within the discretion of the trial court. The policy of the law is to allow trial of actions on their merits. Avery v. Peterson, 243 N.W.2d 630, 632 (Iowa 1976); Severson v. Sueppel, 260 Iowa 1169, 1177, 152 N.W.2d 281, 286 (1967). We find no abuse of discretion by trial court.

II. Defendants next assert that there was insufficient evidence to establish an enforceable contract to pay the commission, and that the ultimate buyers were not introduced by plaintiffs. The trial court found that plaintiffs did introduce the customer to defendants, and had established the existence of an implied contract to pay the commission. We need only consider if there was substantial support for the trial court's findings; if so, they are binding upon us. Rule 14(f)(1), Rules of Appellate Procedure.

Construed most favorably to plaintiffs, the evidence shows that defendant Lavel Abell offered to pay the commission and allowed plaintiffs to continue their efforts to effect a sale of the property after the listing expired. The original \$68,000 purchase offer executed by the ultimate buyers was drawn up by plaintiffs. After defendants rejected that offer, Lavel Abell informed plaintiffs that any commission would have to come out of a price in excess of \$70,000. The sale of the property at that price was delayed only while the buyers incorporated.

The trial court found that the oral contract was not an extension of the written listing, but rather a separate subsequent contract to pay. An oral contract between owner and broker is valid. McHugh v. Johnson, 268 N.W.2d 225, 227 (Iowa 1978); Christensen v. Miller, 160 N.W.2d 509, 510 (Iowa 1968); Morton v. Drielhel, 237 Iowa 1209, 1210, 24 N.W.2d 812, 813 (1946). There was ample evidence to support the trial court's findings that plaintiffs produced a buyer ready, willing and able to buy, on terms acceptable to defendants, and that they were entitled to a commission for their efforts. McHugh v. Johnson, 268 N.W.2d at 227; Moore v. Griffith, 234 Iowa 1024, 1028, 14 N.W.2d 644, 646 (1944). There is no error.

III. The trial court granted judgment against only one defendant, Lavel Abell, for the commission. Defendants assert that the trial court erred in holding one joint tenant liable for the entire commission on the sale. They contend it would be an inconsistent action so as to sever the joint tenancy, making defendants tenants in common and Lavel liable for only one-half the commission. Without determining the status of any joint tenancy, see In re Baker's Estate, 247 Iowa 1380, 78 N.W.2d 863 (1956), we note that plaintiffs' contract was with Lavel, who agreed to pay a commission of four percent of the selling price of the property. The trial court correctly found him liable for the entire commission.

AFFIRMED.