

FILED

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CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

JOHNSTON REAL ESTATE COMPANY,)

Plaintiff-Appellant,)

Filed April 8, 1983

vs.)

**JOHN C. HOLST and MARILYN A.)
HOLST,)**

2-481
2-68159

Defendants-Appellees.)

Appeal from Warren District Cour Thomas S. Bown, Judge.

Plaintiff realty company appeals from judgment entered for defendants in this action to recover a real estate sales commission. **AFFIRMED.**

John P. Dollar of Seery & Dollar, Des Moines, Iowa, for plaintiff-appellant.

James M. Sherburne of Critelli and Foxhoven, Des Moines, Iowa, for defendants-appellees.

Considered en banc.

SCHLEGEL, J.

Plaintiff realty company appeals from judgment entered for defendants in this action to recover a real estate sales commission. Plaintiff claims that the trial court erred in holding: 1) plaintiff was required to show that there was some minimal "causal connection" between its actions and the ultimate sale of defendants' listed property in order to be entitled to a commission; 2) the term "presented" in the listing contract between plaintiff and defendants is synonymous with the term "inspected" in that contract, and that the contract therefore required an actual physical showing of the property by plaintiff to the buyer in order to entitle plaintiff broker to a commission; and 3) plaintiff breached its fiduciary duty to defendants by failing to advise them that prospective buyers could be reserved from the exclusive listing contract and therefore was not entitled to receive a commission. We affirm the judgment for defendants.

In May 1980, defendants, John and Marilyn Holst, who owned a house in Des Moines at the time, met Ronald Curnes and discussed the possibility of buying his property in rural Indianola. Defendants and Curnes subsequently met several times and discussed methods of purchasing the Curnes property, including the possibility of trading the Curnes' property for defendants' house. Curnes inspected defendants' property in Des Moines. However, defendants and Curnes were unable to consummate a trade of properties because Curnes wanted more money to boot than defendants were willing to offer. In June of 1980, a zoning variance was obtained on the Curnes' property to permit defendants to kennel dogs on the property in the event they purchased it. Defendants then made an offer to purchase the Curnes' property, subject to the sale of their house, which offer was accepted. Defendants claimed they agreed with Curnes that in the event they were unable to sell their property outright they would renegotiate a trade after their listing expired.

On July 15, 1980, defendants entered into a standard, exclusive listing agreement with plaintiff real estate broker. The listing agreement was to run for

ninety days, from July 15 to October 15, 1980. Although plaintiff's agent knew of the prior negotiations between defendants and Curnes, she did not tell defendants that prospective buyers could be reserved from the listing contract and the contract contained no such terms. The listing contract provided that a trade was the same as a sale for commission purposes and that plaintiff was entitled to a commission if the "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 thereto."

Plaintiff was unable to procure a buyer for defendants' house during the listing period. However, apparently after hearing rumors that defendants were going to trade properties with Curnes, plaintiff's agent arranged a meeting on the last day of the listing period between herself, defendants and Curnes. At this meeting, plaintiff's agent proposed a trade of the properties under terms which required both defendants and Curnes to pay the agent a sales commission. Defendants and Curnes rejected the agent's proposal for a trade. Plaintiff claimed that Curnes stated he would "wait out the listing," and that Curnes and the defendants took copies of "offers to buy" in which plaintiff's agent had detailed the terms of the trade.

Two weeks after the expiration of the listing agreement, defendants called Curnes and offered \$6,000 plus a trade of properties, which was defendants' initial offer prior to entering the listing agreement. Curnes needed \$5,000 immediately to pay his ex-wife to comply with provisions of a dissolution decree; he therefore agreed to defendants' offer; and the properties were traded. Plaintiff subsequently filed this suit to collect a sales commission based on the trade.

Following a hearing, trial court filed its findings and conclusions denying plaintiff a sales commission. The court found that there was no causal connection or relationship between plaintiff's activities during the listing period

and the ultimate trading of the properties. Relying on out-of-state precedent, the court concluded that to be entitled to a commission, plaintiff must establish some minimal causal connection between its actions and the ultimate sale of the property. The court also concluded that the term "presented" in the listing contract was ambiguous. The court construed "presented" to be synonymous with the term "inspected" as used in the listing contract, and therefore concluded that defendants' property was never "presented" to Curnes during the term of the listing because Curnes never physically inspected the property during that period of time. Finally, trial court concluded that plaintiff breached its fiduciary duty to the defendants by failing to advise them to reserve Curnes as a prospective buyer on the listing contract, and that plaintiff was therefore barred from recovering a sales commission. Plaintiff brought this appeal.

I. Defendant correctly concedes that the trial court erred in its third holding; i.e. plaintiff was not entitled to a commission because it breached its fiduciary duty to defendants by failing to advise them that prospective buyers could be reserved from the exclusive listing contract. The supreme court held to the contrary in Action Real Estate Corporation v. Bulechek, 309 N.W.2d 502, 504 (Iowa 1981), where it was stated that there is no such fiduciary relationship between a broker and a prospective seller prior to the listing contract. This does not conclude our inquiry in this case, however, because the trial court found two alternative grounds to support its judgment for defendants. If the record supports either of those two grounds, the court's ruling ought to be affirmed.

II. We agree with the trial court that plaintiff is not entitled to a real estate commission in this case because plaintiff did not "present" defendant's property to Curnes for purposes of the listing contract. We again set forth the pertinent language of the contract: defendant agreed to pay plaintiff a seven percent commission.

... (c) if 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 thereto.

The parties agree that Curnes did not "inspect" defendant's property during the term of the listing contract and that this appeal turns on whether plaintiff "presented" the property to Curnes during the relevant time.

Since plaintiff furnished the contract in this case, we construe any ambiguities therein against plaintiff. Estes v. Leibsohn, 248 Iowa 1173, 1178, 85 N.W.2d 15, 18 (1957). We agree with the trial court that the term "present" is ambiguous and is therefore to be construed against plaintiff.

There is no Iowa case law defining "present" or "presented" in the context of a real estate listing contract. We decline plaintiff's invitation to adopt the definition found in Black's Law Dictionary (4th ed. 1968): "to tender or offer." That definition is specifically limited to the law of negotiable instruments and therefore has no applicability to this case. We believe a more appropriate definition of "present" in this case is as follows: "to bring a person into the presence of; to offer for viewing or notice; exhibit; display; show." Webster's New World Dictionary (1974). The trial court was therefore correct when it held that "[p]resented, as used in the listing contract, requires the actual physical showing of the property to the ultimate purchaser during the term of the listing." In this sense "presented" is synonymous with "inspected" in that it requires the physical presence of the prospective buyer at the property to be bought. Contrary to plaintiff's assertion, however, this meaning does not render either word superfluous. "Presented" requires some action on the part of someone other than the potential buyer (here, plaintiff), while "inspected" implies action to be taken only by the buyer.

With this definition in mind, we agree with the trial court that plaintiff did not "present" defendants' property to Curnes. It is not disputed that plaintiff did not ever take Curnes out to defendants' property for any reason. Plaintiff's sole claim is that the property was "presented" to Curnes when Virginia Johnston, plaintiff's agent, proposed that defendants and Curnes trade their properties. Under the definition of "presented" adopted above, this is clearly insufficient to constitute a "presentation." The record does not indicate, and plaintiff does not claim, that the latter had any further involvement with Curnes which led to the transaction between him and defendants. Since plaintiff did not "present" the property to Curnes within the meaning of the listing contract, plaintiff was not entitled to a commission.

Because the trial court correctly decided this issue, we need not determine whether plaintiff was required to show a "causal connection" between its actions and the final transaction before it could recover its commission. The judgment of the trial court in defendant's favor is affirmed.

AFFIRMED.