FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

1st FARM AND HOME REALTY, INC. AN IOWA CORPORATION,

Appellee,

vs.

RAYMOND N. KENKEL and EVELYN F. KENKEL,

Appellants.

Filed March 29, 1978

407
2-60077

Appeal from Pottawattamie District Court - Leroy H. Johnson, Judge.

Defendant seller appeals award of broker's commission to plaintiff realtor, claiming he secured his own buyer and therefore owes no commission under the terms of the exclusive agency listing. - Reversed.

Peter J. Peters & Dennis M. Gray, of Peters, Campbell & Pearson, Council Bluffs, for Appellants.

Gregory G. Barntsen & Robert J. Laubenthal, of Smith, Peterson, Beckman, & Willson, Council Bluffs, for Appellee.

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

PER CURIAM

Defendant seller, Raymond N. Kenkel, appeals the trial court's award of a broker's commission to plaintiff First Farm & Home Realty. Kenkel claims he secured his own buyer and, under the terms of the exclusive agency listing, he owes no commission on the sale to Iowa Power. We agree and reverse.

First Farm brought its action in equity; we are here triers of fact to determine anew where the weight of the evidence lies. McCullough Investment Co. v. Spencer, 246 Iowa 433, 437, 67 N.W.2d 924, 926 (1955).

The following facts were established at trial. Prior to any involvement of plaintiff First Farm or realtor Ben Seldin, Iowa Power had decided to purchase the Kenkel land at a top price of $2000 per acre. The first contact of Iowa Power's agent Glenn Appenzeller with the subject property came when he stopped at Ervin Peters' farm, adjacent to the Kenkel farm on July 17, 1973, and began negotiations for its acquisition. Appenzeller indicated to Peters he was also interested in the Kenkel farm. Peters tried unsuccessfully to reach Kenkel by telephone. Appenzeller left stating he would have to deal for the Kenkel property through the realtor Selden whose sign was displayed on the property.

Appenzeller proceeded to Seldin's office and negotiated an option to purchase the Kenkel farm and left an earnest money deposit. Seldin entered the negotiations without any disclosure that he had no current listing or authority to act on Kenkel's behalf. His sign on Kenkel's property was left from a prior listing. Such a disclosure would have resulted in his dealing direct with Kenkel, Appenzeller testified. Later the same day Appenzeller returned to Peters' home and while he was there Kenkel returned Peters' earlier call. Appenzeller refused to speak directly with Kenkel because of the realtor Seldin's involvement. Kenkel told Peters to relate to Appenzeller that his farm was not in any way listed with Seldin, that all Seldin had was an expired listing dating from 1969 or 1970.

Early the next day Seldin solicited Kenkel for a listing contract to consummate his previous day's negotiations. He discovered the property was currently subject to an exclusive agency listing. Kenkel, asserting from the outset he already had a buyer (Iowa Power), refused to tell Seldin who had the listing.

Through a series of telephone calls Seldin eliminated various local realtors until he discovered the First Farm listing. He asked Maurice Clayton of First Farm to come to his office. Kenkel continued to maintain he had his own buyer, Iowa Power, and that under the terms of his contract with First Farm he would consummate the sale without any assistance from Seldin or Clayton or any liability for a broker's commission. Clayton and Seldin continued to claim Iowa Power as their buyer. Kenkel left with discussions at this impasse.

Seldin and Clayton proceeded to Appenzeller's office, remaining silent regarding Kenkel's resistance to their representation of him, negotiated a purchase agreement and received a $5000 earnest money check. That same day, July 18, 1973, when Clayton proffered this agreement and check to Kenkel, Kenkel refused to accept them and disclaimed all connection with these dealings. He continued to insist negotiations with Iowa Power would proceed only at his direction and without his incurring any liability for a broker's commission. On July 19, Kenkel's lawyer wrote Appenzeller apprising him of these circumstances and offering to sell on a $2000 per acre net basis to Iowa Power.

An exclusive agency listing confers exclusive authority upon the broker to find a purchaser. Ingold v. Symonds, 125 Iowa 82, 85 (1904). It is bottomed on protecting the broker from his seller undercutting him by dealing through another broker, or direct with a prospective buyer first procured by the broker's efforts. McCullough, supra, 246 Iowa at 439, 67 N.W.2d at 927. Quite apart from any implied right Kenkel retained to sell his own property, Hedges Co. v. Shanahan, 195 Iowa 1302, 190 N.W. 957 (1923), the parties bargained for a reserved power in Kenkel to secure his own buyer without payment of any broker's commission.

The question determinative of this appeal is factual: who secured Iowa Power as a buyer? The record clearly shows Iowa Power had formed a definite intention to purchase the Kenkel property prior to any contact with Kenkel, Clayton or Seldin. See Larson v. Thoma, 143 Iowa 338, 344, 121 N.W. 1059, 1061 (1909). Clayton exerted no efforts in securing the initial interest of Iowa Power, he never showed the subject property to Appenzeller. Indeed, by the time Clayton was aware of Iowa Power's interest Kenkel was already staunchly claiming Iowa Power as his own

buyer. Quite simply, Clayton had no connection with finding Iowa Power as a buyer. See Estes v. Liebsohn, 248 Iowa 1173, 85 N.W.2d 15 (1957). Accordingly, he has no broker's performance upon which to foundation his claim for a commission.

We find as between an owner allowed by the terms of the listing to secure a buyer by his own efforts and a broker enjoying an exclusive agency listing the windfall of the purchaser finding the property belongs to the owner.

REVERSED.

All judges concur, except Carter, J., who dissents.

277

CARTER, J. (dissenting)

I dissent. The majority opinion correctly concludes that the issues on this appeal are factual. But I view the facts as strongly supporting the judgment of the trial court.

The majority's conclusion that there was no performance by plaintiff upon which to base its claim for a commission is simply not warranted based on the undisputed facts of this case. The plaintiff, acting through its agent, Clayton, did exactly what it had been retained to do, i.e., secure an offer to buy the property on cash terms which were satisfactory to the defendant-seller. This was all that was required of the broker under the listing agreement to earn entitlement to the stated commission of 5 % of the sale price.

The seller's position is not aided by the provision in the listing agreement that "seller is not obligated to pay commission on buyers he secures through his own efforts." To be consistent with the entire agreement, the words "buyers he secures through his own efforts" must refer to bona fide offers to buy on terms specified in the listing agreement. Nowhere in the record is there any support for the idea that the seller had secured such a buyer for his property prior to July 18, 1973. On that date, the first offer for the property which met the terms upon which it was offered for sale came to the plaintiff-broker and through the broker was presented to the defendant-seller. At this point plaintiff became entitled to its commission.

The significance of these undisputed facts is in no way diminished by the majority's speculation on the inclination of the potential purchaser to deal directly with the seller had not the broker intervened. Indeed, there is much evidence to indicate that the majority's conclusion is wrong and that the purchasing agent for Iowa Power much preferred to deal through a broker. This is evidenced by the fact that when said agent believed Seldin to be defendant's broker he insisted on dealing through Seldin. From this fact may be inferred a similar disinclination on the part of the agent to deal directly with defendant once it was learned that plaintiff was the broker with the listing on the property. In any event, it matters not what the buyer's purchasing agent preferred to do. What is significant is the fact that he did submit a qualifying offer through the plaintiff-broker who had the listing on the property.

Where the majority goes astray is by making the unwarranted inference that the defendant's right to sell on his own carried with it the right to veto efforts of the broker to sell to the same party or parties. I cannot so construe the contract which the parties made. Such a construction would be completely contrary to reasonable expectations of the parties in a commercial setting. I submit the broker was perfectly free to seek to obtain an offer from Iowa Power through his own efforts. To the extent that this created competition with his principal, the broker clearly won the contest. My attention has been directed to no sound legal argument which should serve to deny plaintiff the fruits of that victory.

Probably the most significant fact which militates in favor of the recovery granted the plaintiff-broker by the trial court is that of all the parties concerned with this transaction, Peters, Seldin, plaintiff, and defendant, only the plaintiff produced an offer to buy upon conditions specified in the listing agreement. After rejecting such offer, the defendant did not negotiate a sale in accordance with the listing agreement. He obtained only an option agreement. Seldin had only been able to negotiate an option. Plaintiff secured a cash offer to buy. The trial court correctly determined such effort entitled plaintiff to a commission and the judgment below, consistent with that conclusion, should be affirmed.