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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

SCHEUERMAN-RICHARDSON, INC.,

Plaintiff-Appellant,

vs.

JOSEPH C. MOMBERG AND GAIL A. MOMBERG,

Defendants-Appellees.

Filed November 24, 1981

1-342
2-66001

Appeal from Johnson District Court, L. Vern Robinson, Judge.

Plaintiff-real estate broker appeals from the trial court's judgment for the defendants-sellers in an action to collect a real estate commission. REVERSED.

John W. Hayek of Hayek, Hayek & Hayek, Iowa City, for plaintiff-appellant.

John D. Cruise of Barker, Cruise & Kennedy, Iowa City, for defendants-appellees.

Considered by Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

The plaintiff-real estate broker appeals from the trial court's judgment for the defendants-sellers in an action to collect a real estate commission. We reverse.

The trial court made the following findings of fact, which are binding on us, since they are supported by substantial evidence. Iowa R. App. P. 14(f)(l). On November 9, 1979, the Mombergs listed their restaurant business for sale with Scheuerman-Richardson, Inc. The contract provided for a sale price of $79,000, an 8 percent commission, an expiration date of February 9, 1980, and stated, "In the event of a sale within 180 days after the expiration of this listing to any buyer who became interested in the property during the term of this agreement or any extension thereof because of the efforts, communications or information made available by Realtor, Owner or any other real estate broker or salesperson, the commission set forth herein shall be due and payable to Realtor at the time of settlement of said sale." The contract provided that Scheuerman-Richardson, Inc. would submit the listing to the Iowa City Multiple Listing Service within 24 hours after execution of the contract. The realtor never listed the business with the Multiple Listing Service.

A Mr. Waltz talked with the Mombergs about the sale of the business prior to its being listed with the realtor, but abandoned any efforts to buy the business because the price was too high. During the period of the listing contract, Mr. Waltz read an ad placed by the realtor and began inquiring again about the purchase of the business. The realtor assisted in negotiations between the parties, but no contract was signed. After the listing contract expired on February 9, 1980, Mr. Momberg told Mr. Waltz that they should deal directly with each other so that no real estate commission had to be paid. A contract of sale was prepared by Mr. Momberg's attorney and was signed in March of 1980. The purchase price was $53,000. Mr. Momberg had previously rejected an offer for this same amount when it was offered through the real estate agency. When Scheuerman-Richardson, Inc., learned of the sale, it sued for recovery of the real estate commission. The Mombergs counterclaimed for damages for breach of contract.

The trial court concluded that the real estate agency had earned its commission. However, the court also concluded that it had breached the contract by its failure to list the property with the Multiple Listing Service. It decided that the breach was material and that, therefore, the agency should not be able to collect the real estate commission. The trial court also ruled that the Mombergs were not entitled to damages for breach of contract since they had not shown they would have received a greater

price for their business if the contract had not been breached. We affirm that part of the trial court's decision.

In determining that the breach was material, the trial court stated it was relying on certain listed criteria. It stated those were the criteria contained in the Restatement of Contracts § 275 (1932). However, the court erroneously listed the criteria contained in Section 276, which are the rules for determining materiality of delay in performance. It is unclear from the decree whether the trial court applied the criteria contained in Section 275, or those contained in Section 276. We therefore must consider whether the breach was material, using the correct criteria contained in Section 275. See also Restatement (Second) of Contracts § 241 (1981).

We conclude that the failure to submit the listing to the Multiple Listing Service was not a material breach of contract. The Mombergs sold their business to Mr. Waltz, who became interested in purchasing the business through an ad placed by the real estate agency during the period of the contract. Negotiations between the parties were carried out by the real estate agency. Therefore, although we do not condone the actions of the agency in intentionally breaching the contract, we must conclude that the breach was not material. Therefore, it will not excuse the performance of the contract by the Mombergs, and the real estate agency is entitled to its commission. Restatement of Contracts § 274(1)(1932).

REVERSED AND REMANDED FOR ENTRY OF JUDGMENT BY THE TRIAL COURT IN CONFORMITY WITH THIS OPINION.