



IN THE COURT OF APPEALS OF IOWA

IOWA REALTY CO., INC.,)

Plaintiff-Appellant,)

Filed December 30, 1981

vs.

1-202
2-65481

CARROLL M. JONES and)
E. DARLENE JONES,

Defendants-Appellees.)

Appeal from Polk District Court, James P. Denato, Judge.

Plaintiff appeals from the refusal of the trial court to award the full amount of a real estate commission resulting from the sale of defendants' house. REVERSED.

Roger J. Hudson of Stewart, Wimer, Hudson & Flynn, P.C., Des Moines, for plaintiff-appellant.

Robert M. Benton of Schooler & Stuyvesant, Des Moines, for defendants-appellees.

Considered by Oxberger, C.J., and Snell, Carter, and Johnson, JJ. Danielson, J., takes no part.

Plaintiff appeals from the refusal of the trial court to award the full amount of a real estate commission resulting from the sale of defendants' house. We reverse and direct the trial court to award plaintiff his full commission plus interest.

Mike Robinson is a real estate agent employed by plaintiff, Iowa Realty Company, Inc. Robinson contacted defendants, Carroll M. and E. Darlene Jones, concerning the sale of their house. Defendants and Robinson entered into a listing agreement on November 8, 1977, for the sale of defendants' house. Pursuant to the agreement, Robinson began the process of locating a purchaser for defendants' house. Robinson hosted several open house showings at defendants' house and periodically advertised the house in local newspapers.

As a result of Robinson's efforts, Frank and Marlys Sholtec offered to purchase defendants' house on December 11, 1977. Defendants accepted the Sholtecs' offer on December 12, 1977, but only upon certain special conditions. Defendants required the conditions due to the fact the Sholtecs did not have cash available to make the necessary down payment. Defendants, however, agreed to accept a promissory note from the Sholtecs, due June 15, 1978, for the down payment. Defendants accepted the Sholtecs' promissory note only because agent Robinson agreed to accept a promissory note for making payment of the brokerage commission subject to payment of the Sholtecs' promissory note on or before the due date.

The Sholtecs took possession of the defendants' home in late December 1977. The Sholtecs failed to satisfy their promissory note on its due date. Defendants filed a notice of forfeiture of real estate contract on December 29, 1978. A notice to quit was filed by defendants on January 10, 1979, and a petition for forcible entry and detainer was filed on January 24, 1979. An order on the forcible entry and detainer action was filed on February 5, 1979, indicating the parties entered into a separate purchase agreement with a closing date of March 1, 1979. The order also indicated the Sholtecs would vacate the premises on March 1, 1979, in the event they were unable to perform.

Plaintiff at trial contended the defendants were obligated to pay the agreed-upon commission of \$4200 as plaintiffs procured ready, willing and able purchaser for defendants' house. Defendants maintain the plaintiff is not entitled to the commission because the original listing contract had been modified, making the Sholtec's timely satisfaction of the promissory note given to defendants a condition precedent to defendants' obligation to pay the brokerage commission. The trial court held the condition precedent to defendants' duty to pay the commission had not occurred. The trial court, however, held plaintiff was entitled to \$1500 for the time and effort expended and expenses incurred on an unjust enrichment theory.

Plaintiff appeals, claiming the court erred in not awarding plaintiff the full commission.

Since this was an action at law, our review is not de novo. Knauss v. Kemin Industries, 267 N.W.2d 56, 57 (Iowa 1978). The trial court's findings of fact have the force of a jury verdict and are binding on appeal if supported by substantial evidence. Iowa R. App. P. 14(f)(1).

Involved in this case is a construction of the listing agreement between Iowa Realty and the Jones. We see no reason to treat a listing contract differently from any other type of contract. See generally, Kuehle v. Schromen, 258 Iowa 989, 140 N.W.2d 188 (Iowa 1966); Estes v. Leibsohn, 248 Iowa 1173, 85 N.W.2d 15 (Iowa 1957). As a general rule, construction of a contract, the process of determining its legal effect, is a matter of law to be resolved by the court. Farm Bureau Mutual Insurance Company v. Sandbulte, 302 N.W.2d 104, 107 (Iowa 1981). The trial court did not find the listing contract to be ambiguous nor subject to alternative interpretations. Additionally, the trial court made a finding of fact the parties modified the original listing contract by the terms of the promissory notes. See Davenport Osteopathic Hospital Association of Davenport, Iowa v. Hospital Service, Incorporated of Iowa, 261 Iowa 247, 253-54, N.W.2d 153, 157 (Iowa 1967). Thus, the construction of the listing contract and subsequent modification is to be determined as a matter of law. Farm Bureau Mutual Insurance Company v. Sandbulte, 302 N.W.2d at 107-08.

Generally, a realtor's commission is earned by producing a purchaser ready, willing and able to buy on the terms specified in the agency agreement. Gatlon v. Stephen, 239 N.W.2d 159, 161 (Iowa 1976). "Able," within the context of determining whether a purchaser is ready, willing, and able ordinarily refers to financial ability. Murphy v. Brown, 252 Iowa 764, 768, 108 N.W.2d 353, 355 (Iowa 1961)(reversed on other grounds).

The record contains substantial evidence Sholtces were not financially able to consummate the purchase when the offer to purchase was made December 11, 1977. Defendants, however, agreed to accept the Sholtces' promissory note, payable on June 15, 1978. The note was contemplated by all of the parties involved to be satisfied from the proceeds of a personal injury settlement the Sholtces were expecting. In light of the contingent nature of the Sholtces' ability to produce the necessary capital to satisfy the promissory note, defendants executed a promissory note to plaintiff for plaintiff's commission, containing the following language: "This note is due and payable

subject to the performance of F. Frank Scholtee and Maryls R. Scholtee paying the sum of \$4900.00 plus 9% interest to Carroll M. and E. Darlene Jones, said note to same to be due on or before June 15, 1978." The conclusion seems clear the only way Sholtees could be considered ready, willing and able to consummate the purchase was for the defendants to accept the Sholtees' promissory note for the down payment. It also seems clear defendants were willing to accept Sholtees' note only if plaintiff would accept defendants' note for the payment of the brokerage commission subject to the Sholtees' performance. To that extent, the original listing contract was modified. Under the modified listing contract, plaintiff was entitled to payment only when the special condition of the Sholtees performance was satisfied. We also find, however, the parties intended to extend each party's obligation under the real estate listing agreement past the original termination date. We reach that conclusion after considering the actions of the parties subsequent to the execution of the purchase agreement between the Joneses and the Scholtees.

One of the facts indicating a continuation of the agency relationship between the Jones and Robinson under the listing contract was Robinson's efforts in collecting the rents the Scholtee's had agreed to pay to the Joneses until Scholtees' promissory note became due in June. The Joneses' reliance upon Robinson's continued efforts indicates the agency relationship had been extended beyond the original termination date. We also note the Joneses did not elect their remedy seeking to compel enforcement of the Scholtees' note, which had the effect of prejudicing Robinson's claim. That decision evidences the parties' intention to extend each party's obligation under the original purchase agreement. Obviously, the Joneses made that decision with the hope of salvaging the original purchase agreement, if possible. Not until the Joneses instituted the forfeiture action was there any indication of abandonment of the original purchase agreement. Even the renegotiated contract indicates an extension, in effect, of the original purchase agreement by incorporating the same terms regarding the balance of the old contract, the provisions for interest, taxes, insurance and escrows and providing for unpaid rents due to the Joneses. Since we conclude the new agreement is merely a substitute for the old agreement, each party's obligation under that contract continued, even through the forfeiture action. Accordingly, we reverse the trial court's decision and direct the trial court to award plaintiff his full commission plus interest.

REVERSED.