

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2008-CA-002062-MR

DERRINGER EVANS DEVELOPMENT, LLC

APPELLANT

v. APPEAL FROM JESSAMINE CIRCUIT COURT  
HONORABLE C. HUNTER DAUGHERTY, JUDGE  
ACTION NO. 06-CI-00458

BLUEGRASS REAL ESTATE  
CONSULTANTS, INC.

APPELLEE

OPINION  
REVERSING AND REMANDING

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BEFORE: KELLER AND NICKELL, JUDGES; LAMBERT,<sup>1</sup> SENIOR JUDGE.

KELLER, JUDGE: This is from an order granting summary judgment to Bluegrass Real Estate Consultants, Inc., (“Bluegrass”), granting a real estate sales commission for the sale of land owned by Derringer Evans Development, LLC (“Derringer”). We reverse the order of the Jessamine Circuit Court and remand

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<sup>1</sup> Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

with instructions to enter judgment in favor of Derringer. The record reflects that Derringer, as appellant, was the only party to file a brief in this Court. Pursuant to CR 76.12(8)(c)(i) we accept the appellant's statement of the facts and issues as correct. Our holding however, is based on the merits of the case and upon review of the entire record.

## FACTS

In March of 2004, Derringer entered into a ninety day "Exclusive Right to Sell Real Estate" contract (the listing agreement) to sell property located in Nicholasville, Kentucky, with Mike Gooch,<sup>2</sup> a broker d/b/a Gooch and Company, Inc., ("Gooch"). The listing agreement contained a "protection period" mandating the payment of a commission to Gooch for any sale or exchange of the property within a ninety day period following its expiration. In July 2004, an extension of the listing agreement was signed, continuing it through August 2004. This extension lengthened the protection period through November 15, 2004, however, the property did not sell within that time period.

Three weeks after the expiration of the protection period, on December 7, 2004, an offer to purchase the property was submitted by Brenda McCulley ("McCulley"), through her agent, Steve Cocanougher ("Cocanougher"). The offer of \$133,000.00 was accepted with closing set to occur in March 2005. By March 2005, McCulley had been unable to obtain financing to close the contract. Therefore, Derringer agreed to accept a reduced price of \$128,000.00 to

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<sup>2</sup> Bluegrass Real Estate is the successor in interest to Gooch and Company, Inc., and is the assignee of the contract that is the subject matter of this appeal.

be paid within a one year period. Finally, in April 2006, McCulley obtained financing and the transaction closed.

Bluegrass then filed suit seeking a commission from the sale and, after Derringer filed its answer, Bluegrass filed a motion for summary judgment. The trial court, in a notation on the docket sheet, denied Bluegrass's motion. No other order was entered. Approximately two months later, Derringer filed a motion for summary judgment. The trial court noted on the docket sheet that Derringer's motion was granted and indicated that Derringer's attorney would prepare a judgment. No such judgment is in the record. Bluegrass timely filed a motion to reconsider and to set aside summary judgment (motion to reconsider). Nothing else took place for approximately sixteen months, until the trial court entered a notice of dismissal for lack of prosecution. Bluegrass then re-noticed its motion to reconsider and the trial court ultimately held a hearing on that motion. Following the hearing, the trial court noted on the docket sheet that language in paragraph nineteen of the contract was sufficient to meet the requirements of the statute of frauds. Apparently based on that language, the trial court granted Bluegrass's motion and ordered Bluegrass to submit a judgment. Bluegrass apparently did so and the trial court entered judgment on October 6, 2008, awarding Bluegrass \$5,120.00 as a commission plus interest. The judgment does not set forth any findings of fact or the trial court's reasoning for reversing itself.

#### STANDARD OF REVIEW

The standard of review on appeal from a summary judgment is whether the trial court erred in its conclusion that there were no issues as to any material fact or that “all the evidence, viewed in a light most favorable to the opposing party, manifestly reveals that no genuine issues of material fact exist and that the movant is entitled to judgment as a matter of law. . . .” *Poe v. Rice*, 706 S.W.2d 5, 6 (Ky. App. 1986). “The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.” *Steelvest, Inc. v. Scansteel Service Center*, 807 S.W.2d 476, 480 (Ky. 1991). This case may be resolved suitably by summary judgment, but, in favor of Derringer rather than Bluegrass.

#### ANALYSIS

Generally, pursuant to the Statute of Frauds, there must be a writing evidencing an agreement to pay a real estate commission in order to enforce such a claim. Kentucky Revised Statute (KRS) 371.010. “Where the contract gives the agent an exclusive right to sell during a specified period, the agent is entitled to the commission even if the property is sold during that period by the owner or by another person.” *Mayo v. Century 21 Action Realtors, Inc.*, 823 S.W.2d 466, 468 (Ky. App. 1992); citing *Miller v. Woodward*, 234 Ky. 631, 28 S.W.2d 961 (1930). We have long held that should an owner of property attempt to circumvent an agent’s right to the commission by intentionally delaying a sale until after the listing contract expires, the owner may be liable for the commission in the following circumstances:

[I]f the owner and broker have a time limit in their contract covering the sale of the property, then the broker to earn his commission must make the sale within that time limit. Should the broker fail to sell within the time limit and the owner thereafter sell[s] to a prospective purchaser produced by the broker, the owner is not liable for the commission unless he deferred the sale until after the time limit with the intention and purpose of circumventing the broker's right to the commission.

*Reedy v. Beauchamp*, 307 Ky. 409, 412, 211 S.W.2d 393, 394 (1948).

As noted above, the trial court did not make any findings of fact in its judgment. Therefore, we have attempted to glean from the record the court's rationale for reversing itself and awarding a commission to Bluegrass. It appears that the trial court relied on the following language from the listing agreement to support its holding:

DEFAULT: In the event of default, the parties may pursue all available legal remedies. . . . In the event the BUYER defaults, this clause shall operate as an assignment to the broker(s), who would have received a commission, of the SELLER'S right to recover damages from the BUYER in an amount equal to such commission. . . .

To the extent the trial court relied on the preceding language, that reliance was misplaced. The preceding language acts as an assignment of rights in the event of a default while the listing agreement is in effect or during any ninety day protection period. It does nothing to extend the listing agreement or the protection period. If Gooch, as a professional real estate agent, had wanted to extend the listing agreement, he could have and should have obtained a written

extension to protect any claim to a commission. He cannot rely on the preceding language to act as a substitute.

To the extent the trial court entered its final judgment in reliance on an equitable estoppel theory, that reliance is also misplaced. There is no evidence in the record that Gooch made any effort or expended any time in furtherance of the ultimate sale of the property. Furthermore, the affidavits submitted by Bluegrass do not allege that Gooch procured the ultimate purchaser or that Derringer deferred the sale of the property in an attempt to thwart any claim Gooch or Bluegrass might have to a commission. Simply put, the listing agreement expired and neither Gooch nor Bluegrass did anything either explicitly or implicitly to extend it.

Accordingly, the judgment of the Jessamine Circuit Court is reversed and this case is remanded for entry of summary judgment in favor of Derringer.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEE.

David Russell Marshall  
Nicholasville, Kentucky