STATE OF MICHIGAN

COURT OF APPEALS

KEITH METCALF,

Plaintiff-Appellee,

v

E. ALBERT LANGER, JR., and ELIZABETH M. LANGER,

Defendants-Appellants.

UNPUBLISHED
October 21, 1997

No. 189093
Oakland Circuit Court
LC No. 94-488054

Before: Gribbs, P.J., and Young and S. J. Latreille*, JJ.

PER CURIAM.

Defendants E. Albert, Jr., and Elizabeth Langer appeal as of right the trial court's order granting summary disposition to plaintiff Keith Metcalf on his claim for a real estate brokerage commission. We reverse and remand.

I

Plaintiff sued to recover his commission under an "Exclusive Right to Sell Contract" providing plaintiff with the exclusive right to sell defendants' property at an agreed upon price and within a specified period. The original contract plaintiff sent to defendants was modified by defendants. There is a significant divergence between the two parties as to how and when the original contract plaintiff sent to defendants was modified, whether there was a meeting of the minds concerning the terms of the agreement, and whether plaintiff performed.

According to plaintiff, he signed the original contract and sent it to defendants for execution. The original contract specified that plaintiff would be provided the exclusive right to sell defendants' property, and would be paid a commission of three percent upon presentation of a buyer "ready, willing and able to purchase" the property at the price indicated in the contract.

* Circuit judge, sitting on the Court of Appeals by assignment.

Plaintiff further contends (by affidavit and deposition testimony) that defendants returned the contract to him signed, but modified to reduce the commission from three percent to two percent. Plaintiff avers that he ultimately accepted this modification and obtained an offer from defendants' neighbor, Scofield, that complied with the terms of the modified contract. Plaintiff asserts that, only upon learning that their neighbor had made an offer, defendants presented yet a second modification of the contract that contained a new paragraph (paragraph 17) that excluded offers made by anyone owning property within a ten mile radius of the sale property. Interestingly, plaintiff denies that he ever accepted paragraph 17. However, plaintiff claims that he obtained a second offer to buy from a Mr. Bardha that met *all* terms of the twice modified contract prior to the contract expiration date.

As suggested, defendants vigorously contest plaintiff's version of how the original contract was modified. They deny that there was ever a meeting of the minds on the terms of the contract and that plaintiff performed in accordance with the terms of the contract as defendants modified it. Defendants contend that when they received the original contract from plaintiff, they reduced the commission payable from three percent to two percent *and* added paragraph 17. Defendants contend that plaintiff never accepted these two modifications and that they orally revoked the contract in any event before plaintiff presented the Bardha offer.

Plaintiff moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that, (1) there was no genuine issue of material fact that he accepted defendants' counteroffer (which plaintiff alleged to encompass only the lowering of the commission rate) by performance, namely, producing an offer to buy from Scofield, and (2) there was no genuine issue of material fact that, on October 22, 1994, two days before the expiration of the listing period, he had presented to defendants an offer from Bardha to purchase the property for the stated contract price. Plaintiff further argued that the paragraph 17 exclusion was drafted in order to exclude only Scofield, and thus was inapplicable to the Bardha offer. Defendants did not present any documentary evidence in response to the motion, but instead argued that plaintiff's several admissions that he had never accepted defendants' modification precluded the creation of a binding agreement.

At the hearing on the motion, the trial court indicated its belief that plaintiff's performance, i.e., locating a buyer for the property for the list price, constituted acceptance of the contract, including all of defendants' modifications. Notwithstanding the fact that neither party presented proof that the Bardha offer to purchase was in compliance with paragraph 17, the trial court concluded that, whether plaintiff acceded to paragraph 17 was irrelevant because the Bardha buyer was *outside* the ten-mile-exclusion area. At that point, defendants argued for the first time that Bardha owned property within the ten-mile-radius exclusion. Plaintiff's counsel strongly objected, stating that defendants had never raised that allegation prior to the hearing. The Court stated, "unless you can prove that Barta [sic] was within the ten mile limit," plaintiff's motion would be granted. Finally, the trial court agreed with plaintiff that, based on defendant E. Albert Langer, Jr.'s deposition, the limited purpose of the exclusion clause was to exclude Scofield as a potential purchaser of the property. Rather than presenting documentary evidence to support their claim that the Bardha property fell within the ten-mile exclusion, defendants moved for leave to amend their answer to indicate that plaintiff did not conform to the terms of the contract because the potential buyer was not outside the ten-mile-exclusion area. The court refused to

grant leave, indicating that it was "too late in the game," and granted plaintiff's motion for summary disposition.

II

We first conclude that the trial court erred in granting summary disposition to plaintiff.

Appellate review of a trial court's decision with respect to a motion for summary disposition is de novo. *Miller v Farm Bureau Mutual Ins Co*, 218 Mich App 221, 233; 553 NW2d 371 (1996). A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). When deciding such a motion, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence available to it. *Id*. Summary disposition is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Weaver v University of Michigan Bd of Regents*, 201 Mich App 239, 242; 506 NW2d 264 (1993).

Contracts for payment of commission to a broker for negotiating sale or purchase of real property are void unless in writing. MCL 566.132(1)(e); MSA 26.922(1)(e). This section is in derogation of common law and must be strictly construed. *Summers v Hoffman*, 341 Mich 686, 694; 69 NW2d 198 (1955). In the instant case, there exists a signed document, purporting to be a commission agreement for the sale of defendants' property. However, the testimony of both parties regarding the making of the purported contract is highly contradictory. Although a written contract exists in this case, parol evidence is admissible to show that it is void or not of binding force because it did not represent a meeting of the minds. *Mardon v Ferris*, 328 Mich 398, 400; 43 NW2d 904 (1950). Plaintiff in this case claims that defendant E. Albert Langer, Jr., signed and returned the proposed "Exclusive Right to Sell Contract," with only a slight change relating to the commission rate. Plaintiff argues that defendants later added paragraph 17, which, again, excluded sales to owners or principals of similar property within a ten-mile radius of defendants' property. Defendants, however, claim that upon receiving plaintiff's offer, they not only changed the commission rate, but also added paragraph 17.

What is singular about plaintiff's position (and fatal to his effort to sustain the trial court's grant of his motion for summary disposition on appeal) is his steadfast insistence in his amended complaint, affidavit and deposition testimony that he *never* accepted the terms of paragraph 17. In granting summary disposition, the trial court is not permitted to make findings of fact or weigh the credibility of the parties. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). In light of the factual discrepancies apparent in the parties' testimony, summary disposition in this case pursuant to MCR 2.116(C)(10) was inappropriate.

Likewise, we find that summary disposition with regard to whether plaintiff accepted the terms of defendants' counteroffer by performance was also improper. Defendants' counteroffer included a clause excluding sales to owners of similar property within a ten-mile radius of defendants' property. In order to show that he accepted defendants' counteroffer by performance according to the terms of the

contract, plaintiff had to show that the potential buyer he presented was not excluded. Plaintiff failed to present any evidence in this regard. In granting summary disposition, the trial court accepted plaintiff's argument that the exclusion clause was inserted for the sole purpose of excluding defendants' neighbor. In doing so, the trial court made impermissible findings of fact with regard to the scope of the exclusion clause. *Skinner, supra*. Summary disposition pursuant to MCR 2.116(C)(10) was therefore improper. Similarly, we conclude that genuine issues of material fact existed with regard to whether defendants had revoked their counteroffer before plaintiff had a chance to accept it by performance. Defendant E. Albert Langer, Jr., testified that he thought that his counsel had notified plaintiff of the revocation. Plaintiff, however, did not admit to knowledge of the revocation.

III

Finally, we conclude that the trial court abused its discretion in denying defendants leave to amend their answer to add a defense that plaintiff did not comply with the terms of the contract he claims to have performed. It is a fundamental rule of civil procedure in this state that leave to amend pleadings should be given freely. MCR 2.118(A)(2); *Ben P Fyke & Sons v Gunter Co*, 390 Mich 649, 656; 213 NW2d 134 (1973). In the case of amendments sought in order to avoid summary disposition, MCR 2.116(I)(5) states that if the grounds for summary disposition are MCR 2.116(C)(8), (9), or (10), the court shall allow a party to amend their pleadings unless the evidence shows that the amendment would not be justified. See also *Blue Water Fabricators, Inc v New Apex Co, Inc*, 205 Mich App 295, 299; 517 NW2d 319 (1994). The trial court in this case offered only delay as the reason for denying defendants' motion. While delay may be a factor to consider, delay alone does not warrant denial of a motion to amend. *Stanke v State Farm Mutual Automobile Ins Co*, 200 Mich App 307, 321; 503 NW2d 758 (1993). We cannot state with certainty that defendants' motion was motivated by bad faith, or dilatory motive, nor can we state that plaintiff would be prejudiced by the addition of the defense. In fact, because plaintiff claims that he accepted defendants' counteroffer by performance of its terms, he must have been on notice that the distance between defendants' property and the prospective buyer's property would be an issue in the case. Accordingly, the trial court should have allowed defendants to amend their answer.

Reversed and remanded. We do not retain jurisdiction.

/s/ Roman S. Gribbs
/s/ Robert P. Young, Jr.
/s/ Stanley J. Latreille