

STATE OF MICHIGAN
COURT OF APPEALS

CENTURY-21 ASSOCIATES, INC.,

Plaintiff-Appellant,

V

MICHAEL R. BERGER, Individually and as
Trustee of MICHAEL R. BERGER TRUST, and
ESTER E. BERGER,

Defendants-Appellees.

UNPUBLISHED
February 26, 2002

No. 226552
Macomb Circuit Court
LC No. 99-005253-CK

Before: Talbot, P.J., and Gage and Wilder, JJ.

PER CURIAM.

Plaintiff real estate broker appeals as of right from a trial court order granting defendants summary disposition of plaintiff's complaint, which sought to recover an allegedly unpaid commission on the sale of a house that defendants owned. We reverse and remand for further proceedings.

The basic facts giving rise to this case are undisputed. On September 16, 1998, plaintiff and Michael and Ester Berger (hereinafter defendants) entered an "Exclusive Right-To-Sell Listing Agreement" that provided plaintiff for ninety-days the exclusive right to locate a buyer of defendant's house. Pursuant to the listing agreement, plaintiff's facilitation of a sale would earn it a commission equal to six percent of the house's sale price. The listing agreement further provided that "the previously stated commission amount shall be paid . . . if the property is sold . . . within 180 days after expiration of this agreement . . . to anyone who learned of the property" through plaintiff's efforts.¹ No sale occurred during the exclusive listing agreement's ninety-day duration.²

¹ No commission was due within the 180-day period, however, if defendants "entered into a valid listing agreement with another REALTOR limiting the term of this protection period and a sale . . . is made during the term of said protection period." The parties agree that defendants did not utilize a subsequent realtor to arrange the sale of their house.

² The parties had entered a previous, apparently identical, exclusive listing agreement effective from June 8 through September 8, 1998, during which time no sale of defendants' home occurred.

On April 16, 1999, within the 180-day period described in the listing agreement, defendants entered an agreement to sell the house to purchasers who apparently learned of the house through plaintiff's efforts. The "Buy-Sell Agreement" set the sale price at \$475,000. The purchasers agreed to make a \$5,000 earnest money deposit with plaintiff toward the sale price. Immediately beneath the signature of plaintiff's agent acknowledging plaintiff's receipt of the earnest money deposit, the agreement stated the following: "If this is a cooperative sale, \$5,000 of total purchase price shall be paid to the Selling Broker [plaintiff], by Seller [defendants] at closing." The next section of the agreement, entitled "Acceptance of Agreement of Sale," stated in relevant part as follows:

By affixing his signature hereto, Seller accepts this offer and acknowledges receipt of a copy hereof. Seller further agrees that Century 21 Associates . . . as authorized Brokers has/have procured said agreement and has/have brought about this sale; *Seller further agrees to pay Broker(s) for services rendered a commission as set forth in the listing agreement for the sale of the Property.* . . . [Emphasis added.]

Below this language, defendants and the purchasers executed the sale agreement and plaintiff's agent signed the agreement as a witness.

A closing date "Settlement Statement" reflecting the amount of money defendants ultimately would receive from the house sale proceeds indicated a \$5,000 charge for plaintiff's "[b]roker's commission." A disbursement sheet prepared on June 14, 1999, the day before the closing date, reflects that plaintiff received a \$5,000 "[c]ommission."

Plaintiff subsequently filed its complaint alleging that defendants failed to pay plaintiff the six percent commission, totaling \$28,500, to which the buy-sell agreement explicitly entitled it.³ Defendants countered with a motion for summary disposition pursuant to MCR 2.116(C)(7). Defendants suggested that plaintiff's undisputed agreement to accept a \$5,000 commission was demonstrated by its agent's handwritten insertion of the figure "5,000" into the buy-sell agreement and plaintiff's preparation of the settlement statement showing plaintiff's entitlement to a \$5,000 commission. Defendants concluded that because plaintiff already had received \$5,000, its claims for a larger commission were barred. Plaintiff responded that the buy-sell agreement did not label the \$5,000 amount a "commission" and further provided that defendants had to pay the six percent commission described within the prior listing agreement. According to plaintiff, the settlement statement showed defendants' payment of only a \$5,000 commission because at the time of the closing defendants refused to pay the six percent commission.⁴

³ All four counts of plaintiff's complaint sought to recover the exact amount of the six percent commission. Count I alleged breach of contract, Count II claimed that defendants fraudulently represented that they themselves owned their house when the Michael R. Berger Trust in fact owned it, Count III set forth that plaintiff constituted a third party beneficiary of the Buy-Sell Agreement's commission provision, and Count IV alleged quantum meruit.

⁴ In its response to defendants' motion for summary disposition, plaintiff suggested that it "completed the documents in accordance with defendant's directions in order to avoid 'killing' the sale with the purchasers and exposing itself to damages for having done so."

The trial court granted defendants' motion for summary disposition, reasoning as follows:

Two separate places including the closing statement indicate that the commission paid was \$5,000.00. It was accepted by all parties. Had the commission been more, it should have been listed in that agreement. It wasn't. It's clearly listed in the buy-sell agreement it was \$5,000.00, and I agree that that particular paragraph number four overrides the bottom paragraph, because you wrote in a determinate amount, and if that wasn't \$5,000.00, it should have been 28,000 plus five thousand, it should have been written in that spot. It was not. You're nitpicking. A mistake was made when this buy-sell agreement was drafted, and [defendants] shouldn't be responsible for it.

The court entered an order dismissing plaintiff's entire complaint.

Plaintiff contends that the trial court improperly made findings of fact in granting defendant's motion for summary disposition and that the trial court instead should have granted plaintiff summary disposition. This Court reviews de novo a trial court's summary disposition ruling. The trial court apparently granted defendant summary disposition pursuant to MCR 2.116(C)(7). In deciding a motion made under subrule (C)(7), a court should consider all affidavits, pleadings, and other documentary evidence submitted by the parties. If the pleadings or other evidence reveal no genuine issues of material fact, the court must decide as a matter of law whether the plaintiff's claim is barred. *Holmes v Michigan Capital Medical Ctr*, 242 Mich App 703, 706; 620 NW2d 319 (2000).

The trial court found as a matter of law that the buy-sell agreement did not include the six percent commission from the listing agreement and that the buy-sell agreement limited plaintiff's recovery of a commission to \$5,000. We find, however, that the buy-sell agreement contains some ambiguity with respect to the exact amount of commission to which plaintiff was entitled, as reflected by the parties' conflicting interpretations of the provisions of the buy-sell agreement. See *Universal Underwriters Ins Co v Kneeland*, 464 Mich 491, 496; 628 NW2d 491 (2001) (explaining that a contract is ambiguous if its provisions may reasonably be understood in different ways). The buy-sell agreement itself does not specifically denominate the \$5,000 amount a commission, but this amount is payable from the total purchase price, like a commission. The subsequent paragraph located above defendants' and the purchaser's signatures specifically refers to the "commission [six percent of the house's purchase price] as set forth in the listing agreement." This paragraph's utilization of the word "further" suggests that defendants owed the listing agreement commission in addition to the \$5,000 portion of the purchase price previously described. The documents from the closing, however, indicate that the parties treated \$5,000 as the applicable and controlling amount of plaintiff's commission. See *Michigan Millers Mut Ins Co v Bronson Plating Co*, 197 Mich App 482, 495; 496 NW2d 373 (1992) (noting that extrinsic evidence is admissible to show the existence of an ambiguity), *aff'd* 445 Mich 558; 519 NW2d 864 (1994).

Because the buy-sell agreement appears susceptible to multiple meanings regarding the intended commission, the interpretation of the agreement becomes a question of fact. *Port Huron Educ Ass'n v Port Huron Area School Dist*, 452 Mich 309, 323; 550 NW2d 228 (1996). Furthermore, the trial court's finding that "[a] mistake was made when this buy-sell agreement was drafted" also involved a determination of fact. "In an instance of contractual ambiguity,

factual development is necessary to determine the intent of the parties and summary disposition is inappropriate.” *D’Avanzo v Wise & Marsac, PC*, 223 Mich App 314, 319; 565 NW2d 915 (1997).

Defendants argue that, even assuming that the trial court resolved issues of fact, summary disposition nonetheless was appropriate on the basis of the undisputed record showing that the parties intended to limit plaintiff’s commission to \$5,000. We observe, however, that at the time of defendants’ motion for summary disposition, their initial responsive pleading, and the trial court’s decision on the motion, no discovery had taken place. Summary disposition before the completion of discovery is proper only where further discovery does not stand a fair chance of uncovering factual support for the opposing party’s position. *Patterson v Kleiman*, 199 Mich App 191, 193; 500 NW2d 761 (1993), *aff’d* with modifications on other grounds 447 Mich 429; 526 NW2d 879 (1994). At this preliminary stage of the instant case, we cannot conclude that plaintiff stands no fair chance of uncovering factual support for its position that it was entitled to both the \$5,000 amount and the six percent commission described within the listing agreement.⁵

We reverse the trial court’s order granting defendants summary disposition and dismissing plaintiff’s complaint, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Hilda R. Gage
/s/ Kurtis T. Wilder

⁵ We note plaintiff’s suggestion in its brief on appeal that it “intends to prove at trial that the \$5,000 was a transaction coordinator fee separate and distinct from the commission due.”