STATE OF MICHIGAN

COURT OF APPEALS

CENTURY 21 CHALET,

Plaintiff-Appellant,

v

NEW AMERICAN COMPANY, LLC,

Defendant-Appellee.

UNPUBLISHED
November 16, 2004

No. 248307
St. Clair Circuit Court
LC No. 02-002283-CH

Before: Cavanagh, P.J., and Smolenski and Owens, JJ.

PER CURIAM.

Plaintiff appeals as of right the grant of summary disposition in defendant's favor in this breach of contract case. We affirm.

On February 19, 2001, defendant, through its agent T.M. Bahhur, entered into a real estate listing agreement with plaintiff for the purpose of selling a car wash and associated property for $3,650,000. The listing agreement included the following provisions:

> SELLER agrees to pay the REALTOR/BROKER a commission of $ __ or 4% of the sale price upon the consummation of the sale. The commission will be due and payable if a buyer is obtained for the Property by anyone, including the SELLER, during the term of this contract at the price and terms set forth herein, or upon any other price and terms agreed upon by the SELLER. FURTHER, said commission will be paid if:
>
> a) the SELLER refuses to sell when a ready, willing and able buyer is produced at price and terms.
>
> b) the SELLER refuses or is unable to complete a sale pursuant to the terms of a duly executed Offer To Purchase, Purchase Agreement, Contract of Sale, or such other equivalent agreement signed by SELLER.
>
> c) the SELLER, or anyone, sells (or enters into a contract to sell or receives a deposit) within 180 days from the termination or expiration of this contract to anyone to whom the Property has been shown or who has learned of the Property because of the REALTOR/BROKER'S efforts, during the terms of this contract PROVIDED, HOWEVER, the SELLER will not be obligated to pay

such commission if the Property is sold through another licensed real estate broker who is paid a commission or fee during this protection period.

On March 8, 2002, plaintiff produced an offer to purchase the property for $2,250,000 which was signed by "an officer of MI corp. to be formed." Subsequently, someone with the initials A.H. purported to be the "seller" of the property and wrote notes and crossed out terms throughout the offer to purchase. For example, the $2,250,000 figure was crossed out and "2.55 million" was handwritten underneath. There were also several handwritten additions to the "additional conditions" paragraph of the offer to purchase. "A.H." did not sign or date the document. Apparently, no further discussions ensued between the parties and the property was not sold.

On August 22, 2002, plaintiff filed its complaint averring that it was entitled to its commission because it produced a "buyer willing and able to purchase the property at a price of 2,550,000.00," consistent with defendant's counteroffer that was accepted. Defendant sought summary dismissal, pursuant to MCR 2.116(C)(8), on the grounds that the purported purchaser never accepted the alleged "counteroffer" and, in any event, the offer to buy was void for lack of mutuality since it was signed on behalf of a non-existent entity. The trial court agreed with defendant, dismissing the action. This appeal followed.

Plaintiff argues that it was entitled to its commission because the listing agreement did not require it to produce a "binding sales contract" between defendant and a prospective purchaser in order for the commission to be earned. After de novo review of the pleadings, we disagree that plaintiff was entitled to a commission. See *McManamon v Redford Charter Twp*, 256 Mich App 603, 610; 671 NW2d 56 (2003).

Where there is an express listing agreement, a real estate broker must show that he performed the contract in order to be entitled to a commission. See *Hawkins v Smithson*, 181 Mich App 649, 652; 449 NW2d 676 (1989). Here, plaintiff claims that it produced a ready, willing and able buyer for the property under the terms of defendant's counteroffer but that defendant "revoked its counter offer and did so prior to any written acceptance by the buyer." According to plaintiff, it fulfilled its contractual obligation entitling it to commission since defendant refused to sell to this prospective buyer. There are several problems with plaintiff's legal position, but the dispositive one is that defendant neither accepted the offer to purchase, which was signed by a purported agent of a non-entity offering a price almost a million-and-a-half less than the listing price, nor rendered a counteroffer. Therefore, defendant did not refuse to sell to a ready, willing and able buyer at an agreed upon price and terms as required by the listing agreement.

It is undisputed that defendant did not accept the offer to purchase. Further, the alleged "counteroffer" was for the most part illegible, neither signed nor dated, and only initialed "A.H." at various places while the purported agent of the owner, who signed the listing agreement, was T.M. Bahhur. Even if this could be considered a legally sufficient "counteroffer," as plaintiff admits, it was revoked prior to acceptance—a valid exercise of defendant's rights. See *Schostak v First Liquidating Corp*, 320 Mich 406, 417; 31 NW2d 673 (1948), overruled on other grounds in *Seelye v Broad*, 379 Mich 289, 291-292 (1967). Accordingly, this "counteroffer" cannot be considered as establishing any kind of agreement between defendant and the prospective purchaser, and it has no legal relevance with regard to plaintiff's rights as the real estate broker.

See *Board of Control of Eastern Michigan Univ v Burgess*, 45 Mich App 183, 186; 206 NW2d 256 (1973); see, also, *Harper Bldg Co v Kaplan*, 332 Mich 651, 655-656, 52 NW2d 536 (1952).

Although a binding sales agreement is not necessarily required under the terms of the listing agreement, merely soliciting an offer to purchase on defendant's behalf is not sufficient to entitle plaintiff to a commission. Such a conclusion would be tantamount to requiring a seller to accept any offer to purchase from a "ready, willing and able buyer" regardless of the disparity of price and terms provided in the listing agreement at penalty of paying multiple commissions—an untenable result. We note that this is not a case in which the seller simply refused to sell the property despite reaching an agreement regarding the terms. See, e.g., *Advance Realty Co v Spanos*, 348 Mich 464, 468-469; 83 NW2d 342 (1957); *Beatty v Goodrich*, 224 Mich 538; 194 NW 985 (1923). It is also not a case in which a completed sale occurred that was subsequently declared null and void. See, e.g., *Blakeslee v Peabody*, 180 Mich 408, 410-411; 147 NW 570 (1914). Here, plaintiff did not earn its right to commission in accordance with the terms of the listing agreement, i.e., a buyer at agreed upon price and terms was not produced. See *Cunningham v Garber*, 361 Mich 90, 94; 104 NW2d 746 (1960). Therefore, we agree with the trial court that dismissal was proper because plaintiff failed to state a claim upon which relief could be granted. See MCR 2.116(C)(8).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Michael R. Smolenski

I concur in result only.

/s/ Donald S. Owens