

STATE OF MICHIGAN
COURT OF APPEALS

MICHIGAN MOTEL BROKERS, INC., d/b/a
SMITH DEAN BURGETT,

UNPUBLISHED
December 6, 2012

Plaintiff-Appellee,

v

DOUD BOYS, L.L.C.,

No. 308616
Grand Traverse Circuit Court
LC No. 11-028684-CK

Defendant-Appellant.

Before: CAVANAGH, P.J., and HOEKSTRA and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals from the trial court's grant of summary disposition in favor of plaintiff, finding that plaintiff is entitled to a 5% commission on the sale of defendant's property. We vacate and remand because although otherwise entitled to summary disposition, plaintiff failed to allege and prove that it was properly licensed as required by MCL 339.2512a.

On July 13, 2010, the parties entered into an exclusive listing agreement. Plaintiff agreed to use commercially reasonable efforts to sell the property (a motel), to present the property to other licensed real estate companies upon request, and to engage in marketing efforts to expose the property. In exchange, plaintiff was given exclusive sales rights to the property. The agreement provided that if the property sold to any person within one year, or to a person with whom plaintiff had contact within a subsequent six-month period, plaintiff would be entitled to a 5% commission. A few months later, defendant sent plaintiff a letter stating that it no longer wished to sell the property. In its reply letter, plaintiff stated that, while it would not terminate the agreement, it would cease all marketing efforts within the remaining time period of the one-year term and listed eight people with whom it had contact to protect its commission during the second term. In April 2011, 11 months after the agreement, defendant sold the property to a third person with whom plaintiff had no contact. Plaintiff sued defendant to recover a commission.

Plaintiff filed a motion for summary disposition, arguing that it was owed the commission because the sale occurred within the first period of one year. At the motion hearing, defendant argued that plaintiff had waived the one-year term during the exchange of letters and engaged the second period of six months when only protected clients would entitle plaintiff to the commission. The trial court found that defendant had sold the property within the initial one-

year period, and that the parties' exchange of letters had not modified the listing agreement. As such, the court held that plaintiff was entitled to its commission.

Defendant argues on appeal that plaintiff failed to prove it was properly licensed under MCL 339.2512a. Plaintiff argues that defendant waived this issue by failing to raise it below. However, defendant did raise this issue on page two of its brief in response to plaintiff's motion for summary disposition. We agree that plaintiff was required to prove it was a licensed broker at the time of performance in order to recover a commission.

MCL 339.2512a provides:

A person engaged in the business of, or acting in the capacity of, a person required to be licensed under this article [i.e., a real estate broker or salesman], shall not maintain an action in a court of this state for the collection of compensation for the performance of an act or contract for which a license is required by this article without alleging and proving that the person was licensed under this article at the time of the performance of the act or contract.

The language of the statute is unambiguous, and must be applied. *Fleet Business Credit, LLC v Krapohl Ford Lincoln Mercury Co*, 274 Mich App 584, 591; 735 NW2d 644 (2007). Plaintiff does not dispute that it was required to be licensed as a broker or that MCL 339.2512a applies in this case. Plaintiff never alleged in its complaint that it was properly licensed, nor did it submit to the trial court any proof of a brokerage license. Therefore, summary disposition in favor of plaintiff was inappropriate. See *Curry v West Point Hills, Inc*, 30 Mich App 114, 115-116; 185 NW2d 907 (1971).

Defendant also argues that the parties agreed to terminate the listing agreement in their exchange of letters. This argument is meritless. After defendant informed plaintiff that defendant no longer wished to sell the property, plaintiff responded with a letter stating in part:

While I do not terminate Exclusive Listing Agreements, I will cease our efforts toward marketing and selling the Howard Johnson- Traverse City, MI, through the remainder of the initial term of the Agreement, ending July 13, 2011. The secondary term of the Exclusive Listing Agreement expires six (6) months thereafter.

This letter was clearly intended to protect plaintiff's rights under the agreement. Contrary to defendant's argument, the letter confirms that plaintiff would not consider the initial term of the Agreement concluded at any point prior to July 13, 2011.

Defendant further argues that, regardless of plaintiff's intent, defendant had the power to unilaterally revoke the agreement. However, when an exclusive listing agreement has been supported by consideration it may not be revoked by the listing party. *Seelye v Broad*, 379 Mich 289; 150 NW2d 785 (1967). The requirements to make a listing agreement irrevocable are: 1) a provision for exclusive sales rights, 2) a reasonable time limit, and 3) substantial performance of the broker's duties as promised, although the broker is not required to furnish an actual purchaser. *Id.* at 291-292, citing *Ladd v Teichman*, 359 Mich 587, 595-596; 103 NW2d 338 (1960).

Here, plaintiff's exclusive sales rights are enumerated within the contract. Additionally, the agreement provides a period of one year during which time any purchaser whatsoever shall entitle plaintiff to its commission. Defendant does not challenge that time period as being unreasonable. The second element has therefore been met. Next, plaintiff substantially performed the duties it owed to defendant. In the agreement, plaintiff promised to use commercially reasonable efforts to sell the property, to present the property to other licensed real estate companies upon request, and to engage in marketing efforts to expose the property. Plaintiff did in fact make reasonable efforts to sell the property until defendant informed it that defendant no longer wished to sell. As such, defendant could not have terminated the agreement through revocation, because the agreement was irrevocable.

Lastly, contrary to defendant's argument, a broker need not prove his costs in marketing a property to recover damages. An unambiguous contract provision stating a rate of commission is sufficient to entitle a broker to damages. See *Hawkins v Smithson*, 181 Mich App 649, 653; 449 NW2d 676 (1989).

We would affirm the grant of summary disposition in plaintiff's favor if not for plaintiff's failure to satisfy MCL 339.2512a. On remand, the trial court shall hold an evidentiary hearing to determine whether plaintiff holds the necessary license. If so, the court shall allow plaintiff to amend its complaint and grant summary disposition in plaintiff's favor. If not, the court shall grant summary disposition in favor of defendant.

We vacate and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra
/s/ Douglas B. Shapiro