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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0169**

Risk & Associates, Inc.,
Respondent,

vs.

Kim F. Larson,
Appellant,

James Gaasedelen,
Respondent,

Larson-Gaasedelen Joint Venture,
Defendant.

**Filed December 30, 2008
Reversed and remanded
Hudson, Judge**

Hennepin County District Court
File No. 27-CV-06-17629

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Considered and decided by Hudson, Presiding Judge; Bjorkman, Judge; and Collins, Judge.*

UNPUBLISHED OPINION

HUDSON, Judge

Appellant Kim F. Larson challenges awards of summary judgment in favor of respondent Risk & Associates, Inc. and respondent James Gaasedelen. Because there is a genuine issue of material fact as to whether respondent Risk & Associates found a “ready, willing, and able” buyer, and because there is a genuine issue of material fact as to whether Gaasedelen effectively tendered defense of the lawsuit, we reverse and remand.

FACTS

Larson was the owner of record of adjacent parcels of commercial and residential real estate (“property”) in Minneapolis. Gaasedelen owned a minority interest in the property. In July 2004, Larson was referred by his attorney to Ted Risk, principal of Risk & Associates, Inc., to list the property for sale. According to Larson’s affidavit, he told Ted Risk at that time that any sale of the property would have to be contingent on: (1) Larson receiving a lease for his current office for a minimum of two years and a maximum of five years at a reasonable rate; (2) upon termination of the lease, Larson would have the right to remove all dental equipment, cabinets, and oak woodwork from the property; and (3) Risk would not erect any “For Sale” signs on the property in order

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

to protect the goodwill of Larson's dental practice.¹ In December 2004, Larson and Risk executed a standard commercial-industrial exclusive listing agreement for the property. The listing agreement provided that Risk would retain the exclusive right to sell or contract to sell the property for the sum of \$675,000 and would receive a brokerage fee of 6% provided a buyer was procured (by Risk, Larson, or anyone else). According to the listing agreement, if the buyer was "ready, willing, and able to purchase the [p]roperty at the price and terms set forth," and Larson refused to sell, Larson would still be obligated to pay the brokerage fee. The listing agreement also contained a merger clause, which stated that the listing agreement constituted "the complete agreement between the parties and supersede[d] any prior oral or written agreements between the parties."

In May 2005, prospective buyers signed a purchase agreement for a portion of the property for \$475,000, of which 10% was to be financed by Larson through a contract for deed. A second purchase agreement (executed on the same date) dealt with the sale of another portion of the property for \$206,700. Combined, these totaled more than the \$675,000 purchase price required by the listing agreement. An amendment to the purchase agreement made the sale of the property expressly contingent on "[Larson] agreeing to the terms of lease included with this purchase agreement." Those terms included a base rent of more than \$3,000 per month and

a [p]ro [r]ata share of all expenditures incurred by landlord in maintaining, improving, repairing, and cleaning the [b]uilding, including without limiting the generality thereof, the cost for all cleaning, snow removal, interior and exterior

¹ These factual assertions are taken solely from Larson's affidavit and are reflected nowhere else in the record.

painting and/or wallcovering, maintenance salaries, repair services, repair or replacement of paving curbs, sidewalks, signs . . . landscaping, drainage, roof, furnace, HVAC, and lighting facilities

Larson was additionally responsible for a pro rata share of property taxes and special assessments and obligated to pay all utilities (electric, gas, garbage, water, sewer, and phone). A second amendment to the purchase agreement was executed in August 2005, whereby the prospective buyers agreed to provide 100% of the financing. Unhappy with the proposed lease terms, Larson refused to sign the purchase agreement. Claiming that he had produced a “ready, willing and able buyer,” in October 2005, Risk submitted an invoice to Larson for \$40,500 (the claimed amount of the commission under the listing agreement). Larson refused to pay.

In November 2005, Larson and Gaasedelen executed a joint venture termination agreement. Pursuant to the termination agreement, Larson paid Gaasedelen \$238,500 for Gaasedelen’s interest in the property. In the termination agreement, Larson acknowledged the listing agreement with Risk. He also “agree[d] to indemnify, defend, and hold [Gaasedelen] harmless from and against any and all claims, liabilities and obligations of every kind and description contingent or otherwise, arising out of or related to the listing of the subject property for sale with Risk” and to be “responsible for any and all aspects of this listing agreement including, but not limited to, the payment of all commissions relating to the listing agreement or a sale of the subject property.”

Subsequently, Risk brought an action against Larson and Gaasedelen for damages and other relief for “breach of contract and failure to pay [Risk] pursuant to the

commercial-industrial exclusive real estate listing agreement.” Gaasedelen filed an answer to Risk’s complaint and also filed a cross-claim against Larson for indemnification and attorney fees. In late February and early March of 2007, a series of phone calls and follow-up memoranda took place between counsels for Gaasedelen and Larson regarding a potential conflict of interest and whether defense of the lawsuit had been tendered to Larson pursuant to the indemnification provision of the termination agreement. Counsel for Larson claimed that he had previously instructed counsel for Gaasedelen to put the tender of defense in writing so that Larson’s counsel could assess the situation. Gaasedelen’s counsel failed to do so. The parties dispute whether defense was ever validly tendered.

In April 2007, the district court granted Risk’s motion for summary judgment against Larson. In October 2007, the district court granted Gaasedelen’s motion for summary judgment against Larson. This appeal by Larson follows.

D E C I S I O N

Larson argues that the district court erred when it granted summary judgment to respondents Risk and Gaasedelen. “On an appeal from summary judgment, we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the [district] court[] erred in [its] application of the law.” *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). No genuine issue for trial exists “[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party.” *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997) (alteration in original) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986)).

I

Larson argues that there are two genuine issues of material fact which preclude summary judgment for Risk: (1) whether there were additional terms which Risk omitted from the listing agreement and (2) whether Risk found a buyer who was ready, willing, and able to purchase the listed property under the terms of the listing agreement.

Additional terms

Larson argues that Risk omitted additional, previously agreed-upon terms from the listing agreement and that evidence of those terms should not be excluded by the parol evidence rule. Specifically, Larson claims that he and Risk agreed that (1) Larson would be allowed to remove dental equipment, woodwork, and cabinets upon termination of the lease; (2) the lease would be for a minimum of two years and a maximum of five years at a reasonable rate; and (3) no “For Sale” sign would be erected. Larson argues that Risk knew about the additional terms but failed to reduce them to writing. But Larson cites no evidence in the record, other than his own affidavit, to establish that he and Risk agreed to these additional terms.

“[W]hen parties reduce their agreement to writing, parol evidence is ordinarily inadmissible to vary, contradict, or alter the written agreement.” *Hruska v. Chandler Assocs., Inc.*, 372 N.W.2d 709, 713 (Minn. 1985). “The parol evidence rule ‘prohibits the admission of extrinsic evidence of prior or contemporaneous oral agreements, or prior written agreements, to explain the meaning of a contract when the parties have reduced their agreement to an unambiguous integrated writing.’” *Alpha Real Estate Co. of Rochester v. Delta Dental Plan of Minn.*, 664 N.W.2d 303, 312 (Minn. 2003) (quoting

Richard A. Lord, *Williston on Contracts* § 33:1 (4th ed. 1999)). However, “where a written agreement is ambiguous or incomplete, evidence of oral agreements tending to establish the intent of the parties is admissible.” *Gutierrez v. Red River Distrib., Inc.*, 523 N.W.2d 907, 908 (Minn. 1994) (quotation omitted).

Here, the district court determined that the merger clause in the listing agreement establishes that the parties intended the listing agreement to be an integration of their agreement; therefore, evidence of other oral agreements was inadmissible. Accordingly, the district court determined that it was required to make its decision based on the plain language of the listing agreement. We agree and note that the listing agreement was not ambiguous or incomplete. Moreover, the additional terms Larson seeks to introduce would not clarify the listing agreement in any way, nor would they be useful to establish the intent of the parties. Rather, evidence of the prior oral agreement and the additional terms would vary, contradict, and alter the agreed upon terms of the listing agreement—precisely what the parol evidence rule prohibits.

Only if it appears from the circumstances surrounding a case that the parties did not intend an agreement to be a complete integration can parol evidence be used to prove the existence of a separate consistent oral agreement. *Bussard v. Coll. of St. Thomas, Inc.*, 294 Minn. 215, 224, 200 N.W.2d 155, 161 (1972). “A merger clause establishes that the parties intended the writing to be an integration of their agreement.” *Alpha Real Estate Co.*, 664 N.W.2d at 312 (citing Richard A. Lord, *Williston on Contracts* § 33:21 (4th ed. 1999)). Like the district court, we conclude that the merger clause in the listing

agreement demonstrates that the parties intended the listing agreement to be a complete integration of their agreement.

Ready, willing, and able buyer

Larson maintains that the purchase agreement was in conflict with the listing agreement because the purchase agreement provided by the prospective buyers added a multitude of onerous lease terms to which he objected. Thus, Larson argues that the buyer was not “ready, willing, and able” to purchase the property in accordance with the terms of the listing agreement. The listing agreement included a price term, a commission percentage, the obligation to find a “ready, willing, and able buyer,” and boilerplate real estate language. It was silent with respect to additional terms.

Risk argues, and the district court ruled, that because of the presence of a merger clause in the listing agreement, and because there were no other terms in the listing agreement besides the price term, commission amount, and the obligation to find a “ready, willing and able” buyer, Risk fulfilled its obligations and was entitled to the commission. In adopting this argument, the district court largely ignored the fact that the proposed purchase agreement included numerous terms not included in or otherwise addressed by the listing agreement—terms to which Larson objected when they were proffered in the proposed purchase agreement. These additional terms included, among other things, requirements that Larson pay rent of more than \$3,000 per month, pay for a pro rata share of numerous expenditures including repair or replacement of paving, curbs, sidewalks, signs, landscaping, drainage, roof, furnace, HVAC, and lighting facilities. The proposed purchase agreement also obligated Larson to pay for a pro rata share of

property taxes and special assessments for the property, as well as to pay for “all utilities.”

Under general contract law, an acceptance upon terms varying from those offered is a rejection of the offer and puts an end to the negotiations unless the party who made the original offer renews it or properly assents to the modifications suggested. *Lake Co. v. Molan*, 269 Minn. 490, 497, 131 N.W.2d 734, 739 (1964) (citing *Kileen v. Kennedy*, 90 Minn. 414, 97 N.W. 126 (1903)). And regarding a real estate broker’s ability to recover a commission for the identification of a buyer for property, the supreme court has stated that “[a] broker with whom the owners list real property for sale upon terms specified in the listing agreement does not earn a commission when he presents them a purchase agreement containing different terms of sale.” *Gopher State Bus. Opportunities, Inc. v. Stockman*, 265 Minn. 185, 185, 121 N.W.2d 613, 613 (1963), *overruled in part by McDonald v. Stonebraker*, 255 N.W.2d 827 (Minn. 1977); *see Lake Co.*, 269 Minn. at 498, 131 N.W.2d at 739 (quoting this portion of *Gopher State*).

The requirement discussed in *Gopher State* that entitlement to a commission requires the broker to produce a purchase agreement with terms identically reflecting those in the listing agreement has been tempered: where a purchase agreement contains terms that are only insubstantially different from those identified in the listing agreement, the agent is not necessarily precluded from recovering a commission. *See McDonald*, 255 N.W.2d at 829 (stating that, where the listing agreement required a \$50,000 down payment, “[we] agree with the trial court’s finding that the \$50,000 downpayment term was satisfied by the offer of \$500 in earnest money and the promise to pay \$49,500 less

than 1 month later at the time of execution of the contract for deed, and holding that, “[i]n so far as [*Gopher State*] holds otherwise, it is overruled”); *see also Sterling Invs., Inc. v. Potthoff*, 292 Minn. 500, 500, 195 N.W.2d 592, 592 (1972) (per curiam) (affirming the denial of the recovery of a commission where, among other things, “[t]he variances [between the terms of the listing and purchase agreements] were greater than those found sufficient to deny recovery of a broker’s commission in [*Gopher State*]”); *ERA Town & Country Realty v. TEVAC, Inc.*, 376 N.W.2d 526, 527 (Minn. App. 1985) (concluding that a broker has fully performed its obligations under a listing agreement by procuring a buyer ready, willing, and able to purchase the property on terms at some variance to the listed terms).

As noted above, this record shows that the terms proffered by the prospective buyers in the proposed purchase agreement included terms in addition to those in the listing agreement. Given the extent of the differences, we conclude that a genuine issue of material fact exists regarding whether Risk found a buyer “ready, willing, and able to purchase the property” on terms sufficiently close to those set forth in the listing agreement that the proffered purchase agreement falls within the exception to the general rule. Therefore, summary judgment was improper. Because we reverse the grant of summary judgment, we need not address Larson’s argument that the district court erred when it failed to address his affirmative defenses.²

² As one of his affirmative defenses, Larson argues that Risk failed to allege and prove in the initial pleadings that its representative, Ted Risk, is a licensed real estate broker. Under Minn. Stat. § 82.18, subd. 1 (2006), Risk clearly has the obligation to allege and

II

Larson argues that there is a genuine issue of material fact which precludes summary judgment for Gaasedelen; specifically, whether Gaasedelen affirmatively tendered defense of this lawsuit to Larson. “[I]ndemnification for attorney fees [on a duty to defend] is generally available only where defense has been tendered and refused.” *Lundeen v. Lappi*, 361 N.W.2d 913, 917 (Minn. App. 1985), *review denied* (Minn. Apr. 18, 1985). Gaasedelen argues that tender had functionally been accomplished because Larson was on notice of the lawsuit. Gaasedelen likens his relationship with Larson to that of an insurer and insured, and cites *Home Ins. Co. v. Nat’l Union Fire Ins. of Pittsburgh* for the proposition that “[o]nce notice is given, even without an express request for a defense, it should be the responsibility of the insurer to contact the insured to determine whether the insurer’s assistance in the suit is required.” 658 N.W.2d 522, 533 (Minn. 2003). *But see Hooper v. Zurich Am. Ins. Co.*, 552 N.W.2d 31, 36 (Minn. App. 1996) (holding that where policy mandated that insured notify its insurance company of lawsuit, the insured did not have the option of tendering defense by mentioning lawsuit to broker), *review denied* (Minn. Sept. 20, 1996). Moreover, appellant persuasively argues that the *Home Insurance* case’s holding concerning what constitutes a tender of defense from an insured to an insurer should not be expanded beyond the scope of insurance cases, and Gaasedelen cites no legal authority for doing so.

prove its representative is a licensed real estate broker, salesperson, or closing agent, or face dismissal of the claim.

The unique characteristics of the insurer-insured relationship were clearly key to the Minnesota Supreme Court's opinion in *Home Insurance*:

We agree with the supreme courts of Illinois, New Hampshire, and Wisconsin that sound public policy does not support a rule that requires *insureds* to expressly request a defense in order to trigger the duty to defend. Three broad reasons support defining "tender" as giving the *insurer* notice and opportunity to defend a covered lawsuit: first, it clarifies the duties of the parties early in the litigation; second, it acknowledges the greater knowledge and sophistication of the *insurer*; and third, it places no significant burden on *insurers*.

Home Insurance, 658 N.W.2d at 532 (emphasis added). We agree with appellant that "[n]one of these reasons compels the application of the *Home Insurance* standard to a non-insurance case like this one."

Gaasedelen further argues that his counsel's phone call to Larson's counsel was sufficient to constitute a tender of defense. But the district court did not address whether Gaasedelen ever effectively tendered defense of the suit to Larson. Thus, the district court also did not address whether Larson refused to defend. The exchange of letters between the respective attorneys pointedly illustrates that there was indeed a genuine issue of material fact as to whether both conditions were satisfied (tender of defense and refusal to defend) which would result in an award of attorney fees to Gaasedelen for the lawsuit with Risk. Summary judgment on this issue was therefore improper.³

³ We do not reach the issue of attorney fees because a determination of whether Gaasedelen is entitled to attorney fees incurred as a result of his cross-claim for indemnification first requires a determination of whether defense was effectively tendered and refused.

Because the prospective buyers included numerous additional terms in the purchase agreement, we conclude that there is a genuine issue of material fact as to whether Risk found a buyer who was “ready, willing, and able” to purchase the property in accordance with the listing agreement; and because it is unclear whether Gaasedelen affirmatively tendered defense of the lawsuit and whether that tender was refused, there is also a genuine issue of material fact as to whether defense was tendered and refused. Summary judgment as to both claims was therefore improper.

Reversed and remanded.