NO. COA10-1522
NORTH CAROLINA COURT OF APPEALS

Filed: 18 October 2011

SUPRINA STEPP, d/b/a
STEPPING STONE PROPERTIES,
Plaintiff,

v. Transylvania County
No. 07 CVS 526

AUBREY DALE OWEN and
LAURIE W. OWEN,
Defendants.

Appeal by Plaintiff from orders entered 15 January 2010 by Judge Dennis J. Winner and 14 June 2010 by Judge Gary Trawick in Transylvania County Superior Court. Heard in the Court of Appeals 10 May 2011.

Ferikes & Bleynat, PLLC, by Edward L. Bleynat, Jr. and Mary March Exum, for Plaintiff-Appellant.

Charles W. McKeller, for Defendant-Appellee Aubrey Dale Owen.

BEASLEY, Judge.

Suprina Stepp d/b/a Stepping Stone Properties (Plaintiff) appeals from the trial court's orders granting Aubrey Dale Owen (Defendant) partial summary judgment on Plaintiff's *quantum*

meruit claim and granting Defendant's motion for directed verdict on Plaintiff's breach of contract claim. We affirm.

By consent order in a separate domestic matter, Defendant and his former wife, Laurie W. Owen (collectively, "the Owens"), were to convey certain real and personal marital property (Property) to satisfy Defendant's distributive award. A 45-day "Exclusive Right to Sell Listing Agreement" (Listing Agreement) between the Owens as Sellers and Plaintiff herein as Agent was duly executed on 16 May 2006 and incorporated into the consent order. Paragraph 9 of the agreement set forth a listing price of $5,000,000 and provided that Plaintiff would earn 10% of the purchase price if the agent procured a buyer, the property was sold during the term of the agreement, or if within ninety days after the expiration of the agreement, the seller sells to a buyer procured by the agent.

Within a month, FN3, LLC (FN3) made an offer at the listed price, and an "Agreement for Purchase and Sale of Real Property" (Sales Contract) was executed by Defendant on 14 June 2006. FN3 agreed to finance $4,950,000, by its lender (Bank), by letter dated 3 November 2006, indicated it might lend only the lesser of $4,000,000 or 80% of the Property's appraised value.

Negotiations thus resumed, and on 8 January 2007, FN3 offered $4,600,000 for the Property, contingent on closing on or before 15 May 2007. On 22 February 2007, however, FN3 requested the return of its earnest money deposit, believing a purchase would not be effectuated by that time. But, negotiations continued, and on 13 April 2007, the Bank committed to loan FN3 the lesser of $3,350,000 or 75% of the re-appraised Property value, contingent upon Defendant's continued involvement in the management. FN3 proposed options to meet this proviso, each requiring Defendant to retain an ownership interest. FN3 first offered $4,800,000 for the entire Property, with a requirement that Defendant re-purchase a one-third interest. A subsequent offer memorialized in a "Memorandum of Contract" contemplated FN3's purchase of a two-thirds interest in the Property for $3,196,800. While FN3 signed this memorandum on 26 July 2007, Defendant never did.

By separate order, the trial court granted Defendant a 60-day extension from 24 September 2007 to consummate a sale of the Property and distribute the agreed-upon sum to Mrs. Owen. About one month later, Defendant sold the Property after independently

negotiating an agreement with Confluence Enterprises, Inc. (Confluence) on 15 October and closing on 30 October 2007.

When Defendant did not pay Plaintiff any commission, Plaintiff filed a complaint for breach of contract or, in the alternative, *quantum meruit*, seeking compensation for her brokerage services. Defendant moved for summary judgment as to all claims, and Plaintiff responded with an affidavit and exhibits detailing her efforts at securing a deal with FN3 on behalf of Defendant. Following a hearing, the trial court granted partial summary judgment to Defendant on the *quantum meruit* claim but left Plaintiff's breach of contract action for trial, which was held on 24 May 2010. At the close of Plaintiff's evidence, the trial court granted Defendant's motion for directed verdict on the breach of express contract claim, as reflected in a written order entered 14 June 2010. Plaintiff appeals from the partial summary judgment order and the dismissal order.

Plaintiff argues that Defendant's directed verdict motion on her breach of contract claim was erroneously granted.

A motion for directed verdict should be granted if the evidence, in the light most favorable to the non-movant, "fails to show the existence of each element required to establish the cause of action pursued by the plaintiffs," as the question is whether "as a matter of law, the evidence was insufficient to take the case to the jury." *Chappell v. Donnelley*, 113 N.C. App. 626, 628-29, 439 S.E.2d 802, 804 (1994). We review a trial court's grant of a motion for directed verdict *de novo*. *Herring v. Food Lion, LLC*, 175 N.C. App. 22, 26, 623 S.E.2d 281, 284 (2005).

To prove breach of contract, a plaintiff must show that a valid contract existed and that its terms were breached. *See Poor v. Hill*, 138 N.C. App. 19, 26, 530 S.E.2d 838, 843 (2000).

There is no dispute that a valid contract existed when Plaintiff and the Owens entered into the Listing Agreement, giving Plaintiff the exclusive right to sell the Property for 45 days from 16 May 2006 until 30 June 2006 (Term).

Plaintiff contends that she did, in fact, procure FN3 as a party that was ready, willing, and able to consummate a sale with Defendant within the original Term of the Listing Agreement—thereby discharging her contractual duties and earning

her commission under Paragraph 9(a)— but that the consummation of the sale was thwarted by Defendant's own actions. The entirety of the evidence, however, is to the contrary.

A realtor's entitlement to commission generally depends on her procuring, during the listing period, a purchaser who is ready, willing, and able to buy the property on the seller's approved terms. *Jaudon v. Swink*, 51 N.C. App. 433, 434, 276 S.E.2d 511, 512 (1981). A "ready, willing, and able" prospect is one that "desires to purchase, is willing to enter into an enforceable contract to purchase, and has the financial and legal capacity to purchase within the time required on the terms specified by the seller." *Resort Realty of the Outer Banks, Inc. v. Brandt*, 163 N.C. App. 114, 118, 593 S.E.2d 404, 408-09 (2004) (internal quotation marks and citation omitted). Plaintiff argues that the lack of a closing with FN3 does not negate that the prospective purchaser was a ready, willing, and able one.

We agree that closing a transaction is not required but do not glean any evidence from the record that tends to show Plaintiff in fact procured FN3 during the contract Term. While FN3 did agree to purchase the entire Property for $5,000,000

during the Term of the Listing Agreement, it could not secure the necessary financing and subsequently began proposing altered terms and additional provisions, several of which were unacceptable to Defendant. Thus, even though FN3's initial offer resulted in an agreement to sell during the Term of the Listing Agreement, the 14 June 2006 Sales Contract included several contingencies that never materialized, thus it cannot be said that the entity was ever ready to purchase the Property before the Listing Agreement lapsed. As such, Plaintiff did not procure FN3 during the listing period, and we address below whether her continued efforts thereafter entitle her to a commission under an implied contract or otherwise.

Moreover, the ultimate sale to Confluence did not occur until 30 October 2007, over one year after the Listing Agreement expired. Nothing suggests that Plaintiff or Defendant ever communicated with Confluence during the Term of the Listing Agreement or within the 90-day protection period. To the contrary, the only evidence of any contact between Defendant and Confluence prior to the closing is their agreement to sell on 15 October 2007, also more than a year after the Listing Agreement expired. Thus, no valid contract existed between the parties at

any time that Defendant and Confluence communicated or reached an agreement to sell the Property, and subsections 9(b)-(c) accordingly afford Plaintiff no relief under the theory of express contract. Furthermore, no extension of the Listing Agreement was ever executed, and while admitting there was never a written renewal thereof, Plaintiff contends it "was renewed in the eyes of all involved" based on the parties' conduct.

It is Plaintiff's position that the Listing Agreement "was extended and still alive through at least 23 November 2007" and that she earned her fee not only by virtue of Defendant's sale to Confluence but also through her continued efforts with FN3. Where the term of a listing agreement has expired and the agency has thereby terminated under the contract, two factors in determining the broker's right to compensation on sales achieved thereafter are: (i) "whether the purchaser was procured through the efforts of, or independently of, the broker" and (ii) "other particular circumstances," such as "fraud or waiver on the part of the principal." Annotation, ***Broker's Right to Commission on Sales Consummated After Termination of Employment,*** 27 A.L.R.2d 1348 § 1b (Supp. 2010). We have acknowledged that a time limit in a brokerage contract "may be waived or impliedly extended by

the principal, thereby entitling the broker to a commission on a transaction consummated after the technical termination of the agency contract." *Caroatlantic Realty, Inc. v. Matco Grp., Inc.*, 151 N.C. App. 464, 469, 566 S.E.2d 134, 138 (2002) (citation omitted).

It is undisputed however, that the sale consummated here—that to Confluence—was not to any prospect of Plaintiff's and was in no way attributable to her efforts. She does not purport to be the procuring cause thereof but contends, rather, that notwithstanding the lapse of the express contract, the Listing Agreement remained in force and her fee was "deemed earned" under the exclusivity clause of Paragraph 9(b) when Defendant reached an independent deal with Confluence. Apart from the ultimate sale to Confluence, Plaintiff further argues that she was entitled to her fee under Paragraph 9(a) in any event because she procured a ready, willing, and able buyer in FN3, despite the failure to close. We address each in turn.

Plaintiff suggests that she earned her fee upon the sale to Confluence because "[D]efendant sold to another party" during the "extension period" of the Listing Agreement, thus triggering the exclusivity clause under Paragraph 9(b). While we have

observed the operation of waiver as to the listing period in other circumstances, our Courts have not addressed whether such an implied extension of a brokerage contract's termination date also revives the exclusive nature of an original exclusive right to sell pursuant to a listing agreement, absent a written renewal thereof or an oral agreement expressly modifying the time for performance.

It has been generally stated, however, that

> [t]he fact that a brokerage contract is exclusive, in that it gives the broker an exclusive agency or gives the broker the sole right to sell the property, ordinarily does not entitle the broker to commissions on a sale consummated by the owner or through another broker after termination of the first broker's contract; the exclusiveness of the contract is deemed to end with its termination.

12 Am. Jur. 2d *Brokers* § 292 (addressing effect of exclusive brokerage agreements on agent's compensation when transaction is consummated after termination of agency contract). As Plaintiff had no "part in procuring the customer finally dealing with the principal" and there is no evidence of any fraud by Defendant or intent to delay the transaction with Confluence until the expiration of the Listing Agreement, the case law indicates that Plaintiff is not entitled to her commission. *See generally id.*

With respect to the question of waiver, our review of other decisions in relation to the facts of this case convince us that any waiver of the termination date was not sufficient to retain the enforceability of the original exclusivity provision.

We agree with Plaintiff that certain evidence could have caused the jury to find that listing period was waived in some sense, including: (i) Defendant's continued use of Plaintiff's brokerage services after 30 June 2006 and following the ninety-day protection period in attempting to work out a deal with FN3; (ii) Defendant's statement to Plaintiff in February 2007 that he would not sign any agreement with FN3 that did not include Plaintiff's brokerage fee; and (iii) Plaintiff's maintenance of regular contact with both Defendant and FN3 to work towards a deal between the parties even after the lapse of several deadlines in various offers to purchase from FN3. *See Carolantic Realty*, 151 N.C. App. at 469, 566 S.E.2d at 138 However, Plaintiff's efforts, as approved by Defendant, tend to support an extension of the agency relationship *only insofar as it related to the FN3 deal*.

The doctrinal principles behind exclusive right to sell listing agreements also support our conclusion that the parties'

continued dealings as to FN3 were insufficient to retain the exclusivity provision of the agency contract and did not entitle Plaintiff to any fee by virtue of Defendant's independent sale to Confluence. *See Insurance & Realty, Inc. v. Harmon*, 20 N.C. App. 39, 42, 200 S.E.2d 443, 445 (1973). We emphasize that we do not suggest that the exclusive nature of a listing agreement can never be extended by a principal's waiver of the contract's termination date. However, under the facts of this case, where the Term was never modified by agreement, either written or oral; any agency relationship following the express Term was acknowledged by the parties only insofar as FN3 was concerned; no evidence showed that Plaintiff sought to reach a deal with, or even showed the property to, any other potential buyers or that Defendant asked or expected her to do so, we hold that Plaintiff cannot recover a commission under Paragraph 9(b) of the Listing Agreement because the circumstances are such that the exclusiveness of the contract ended with its express termination.

We also summarily reject Plaintiff's contention that the term of the Listing Agreement was somehow extended to 24 November 2007 by either (i) the Final Judgment entered in the

Owens' domestic matter, which referenced the progress of the deal with FN3 and ordered that Defendant, not Mrs. Owen, would be responsible for any commission ultimately owed Plaintiff; or (ii) the companion order extending the deadline for Defendant's distributive award payment to Mrs. Owen to 24 November 2007, in anticipation of a consummated purchase with FN3.

Having held that Plaintiff did not procure FN3 as a ready, willing, and able buyer during the Term of the Listing Agreement and assuming, without deciding, that the termination date of the contract was waived for the purpose of reaching a deal with FN3, we find no evidence that Plaintiff ever procured FN3 thereafter.

Thus, directed verdict on the breach of contract claim was proper, as the evidence was insufficient as a matter of law to entitle Plaintiff to recover a commission under either the exclusive right to sell or procuring cause terms of the Listing Agreement.

In the alternative, Plaintiff argues that the trial court erred in granting partial summary judgment to Defendant on her *quantum meruit* claim.

A summary judgment motion must be granted if the pleadings and any depositions, answers to interrogatories, admissions, or

affidavits "show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2009). It is the moving party's burden to show that the evidence, viewed in the light most favorable to the non-moving party, creates no genuine issue of material fact. *Caroatlantic Realty*, 151 N.C. App. at 467, 566 S.E.2d at 136.

"In order to prevent unjust enrichment, a plaintiff may recover in *quantum meruit* on an implied contract theory for the reasonable value of services rendered to and accepted by a defendant." *Horack v. Southern Real Estate Co.*, 150 N.C. App. 305, 311, 563 S.E.2d 47, 52 (2002). We note that Plaintiff's *quantum meruit* claim appears to be inconsistent with her breach of contract action, where she: (i) maintained at trial that although the listing had lapsed, Defendant waived the termination date; (ii) argues on appeal that the Listing Agreement "was renewed in the eyes of all involved"; and (iii) seeks to recover under the express provisions of a contract she contends was still in force. *See Beckham v. Klein*, 59 N.C. App. 52, 58, 295 S.E.2d 504, 508 (1982). However, "*quantum meruit* will not be denied where a contract may be implied from the

proven facts but the express contract alleged is not proved." *Sheerer v. Fisher*, 202 N.C. App. 99, 105, 688 S.E.2d 472, 476 (2010) (internal quotation marks and citation omitted). While inappropriate as a remedy when there is an express contract or mutual agreement between the parties, if it had been found that Defendant waived the termination date after the Listing Agreement expired on 30 June 2006, Plaintiff might have still been able to recover in *quantum meruit* upon a showing that she non-gratuitously rendered services to Defendant, who knowingly and voluntarily accepted them and was conferred a benefit thereby. *Caroatlantic Realty*, 151 N.C. App. at 470, 566 S.E.2d at 138-39.

Because the work Plaintiff performed on behalf of Defendant had absolutely no correlation to the sale of the Property to Confluence, the trial court properly granted summary judgment on the *quantum meruit* theory.

In conclusion, we affirm the trial court's order for directed verdict for Defendant on the breach of contract claim and the grant of summary judgment for Defendant on the *quantum meruit* claim.

Affirmed.

Judges McGEE and STROUD concur.

Report per Rule 30(e).