

[Cite as *Crilow v. Wright*, 2011-Ohio-159.]

COURT OF APPEALS
HOLMES COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JENNIFER CRILOW, et al.

Plaintiffs-Appellees

-vs-

KATHY WRIGHT aka KATHY
BOSKOVITCH

Defendant-Appellant

JUDGES:

Hon. William B. Hoffman, P. J.

Hon. Sheila G. Farmer, J.

Hon. John W. Wise, J.

Case No. 10 CA 10

OPINION

CHARACTER OF PROCEEDING:

Civil Appeal from the Municipal Court, Case
No. CVF 0900396

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

January 14, 2011

APPEARANCES:

For Plaintiffs-Appellees

For Defendant-Appellant

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Wise, J.

{¶1} Appellant Kathy Wright aka Kathy Boskovitch appeals the May 13, 2010, decision of the Holmes County Municipal Court granting judgment in favor of Appellees Jennifer Crilow and Judi Raber in the amount of \$5,850.00.

{¶2} Appellees have not filed a brief opposing this appeal. Appellate Rule 18(C) states in pertinent part:

{¶3} “If an Appellee fails to file his brief within the time provided by this rule, or within the time as extended, the appellee will not be heard at oral argument * * * and in determining the appeal, the court may accept the appellant's statement of the facts and issues as correct and reverse the judgment if appellant's brief reasonably appears to sustain such action.”

STATEMENT OF THE FACTS AND CASE

{¶4} This case arose out of a dispute concerning a real estate listing agreement between Defendant-Appellant Kathy Wright, aka Kathy Boskovitch, ("Appellant") and third-party County Wide Realty, Ltd. ("County Wide"). The relevant facts are as follows:

{¶5} On August 20, 2008, Appellant Wright entered into a written real estate listing agreement with real estate agents Jennifer Crilow and Judy Raber for the sale of certain real estate known as Lot 286 at Lake Buckhorn in Holmes County, Ohio. The listing agreement extended until February 28, 2009, and contained a six month Protection Period. At this time Crilow and Raber worked as realtors for Real Estate Showcase.

{¶6} In January, 2009, Crilow and Raber left Real Estate Showcase and moved to County Wide Realty. Real Estate Showcase told Crilow that they could take Appellant Wright's listing with them to their new employment along with a number of other listings.

{¶7} At that time, in January, 2009, Appellee Crilow contacted Appellant Wright by telephone to inquire as to whether she was willing to sign a new listing agreement with County Wide. Appellant indicated that she would be willing to enter into a new listing contract with the same terms as the original with the following exceptions: (1) an April 30, 2009, termination date; and (2) an eight percent (8%) commission if the Property sold within the first thirty (30) days or a six percent (6%) commission if the Property later sold outside of the initial thirty (30) days but while the Property was still listed.

{¶8} Shortly after verbally agreeing to the above terms, in January, 2009, County Wide mailed Appellant a written listing form in an attempt to memorialize this oral agreement.

{¶9} Upon receipt and review of the written agreement, Appellant discovered that such written agreement did not accurately reflect the verbal agreement. Appellant then proceeded to place an "X" through a portion of the Protection Period clause in paragraph 5 of the written listing agreement and initialed it. At this time, Appellant also made additional written changes to the written agreement: she changed the termination date of the contract from July 31, 2009 to April 30, 2009; she included an additional incentive of 8% commission if the property sold within 30 days; and, she corrected her name, her address, her cellular telephone number.

{¶10} After modifying the terms of the 2009 listing agreement as described above, Appellant signed and returned the document to County Wide. Upon receipt of the 2009 Listing Agreement, County Wide did not accept, via writing or otherwise, the proposed alterations made by Appellant.

{¶11} Between this time and the expiration of the listing period on April 30, 2009, County Wide listed, advertised and marketed the property.

{¶12} During the listing period, Appellee Crilow showed the property to Michael Ballway and his wife.

{¶13} Subsequently, after April 30, 2009, County Wide stopped listing the Property.

{¶14} Appellant did not retain another real estate broker but instead marketed the property herself.

{¶15} On September 4, 2009, within six (6) months after County Wide discontinued listing the Property, Appellant sold the Property to Michael Ballway and his wife for \$97,500.00.

{¶16} On October 9, 2009, County Wide filed a Complaint in the Holmes County Municipal Court alleging claims for breach of contract and unjust enrichment against Defendant-Appellant.

{¶17} On March 4, 2010, County Wide assigned its interest in the Oral Listing Agreement to Appellees.

{¶18} On March 10, 2010, Appellees, as the real parties in interest, filed an amended complaint in the Holmes County Municipal Court alleging claims for breach of contract and unjust enrichment against Defendant-Appellant.

{¶19} On April 19, 2010, this matter proceeded to trial.

{¶20} On May 13, 2010, the trial court issued its Judgment Entry in favor of Plaintiffs-Appellees in the amount of \$5,850.00 plus costs and interest at 4% from the date of judgment.

{¶21} It is from this judgment entry that Defendant-Appellant now appeals.

ASSIGNMENTS OF ERROR

{¶22} "I. THE TRIAL COURT ERRED BY HOLDING THAT, AS A MATTER OF LAW, THE ORAL CONTRACT BETWEEN DEFENDANT-APPELLANT KATHY WRIGHT (AKA KATHY BOSKOVITCH) AND COUNTY WIDE REALTY, LTD. IS AN ENFORCEABLE CONTRACT SATISFYING THE STATUTE OF FRAUDS THROUGH THE DOCTRINE OF PARTIAL PERFORMANCE.

{¶23} "II. THE TRIAL COURT ERRED BY HOLDING THAT THE TERMS WITHIN THE LISTING FORM SENT IN JANUARY 2009 FROM COUNTY WIDE REALTY, LTD. TO DEFENDANT-APPELLANT KATHY WRIGHT (AKA KATHY BOSKOVITCH) ARE VALID AND ENFORCEABLE AGAINST APPELLANT."

I., II.

{¶24} We shall address Appellant's assignments of error together.

{¶25} As set forth herein, Appellant primarily contends that the trial court erred as a matter of law in holding that the oral listing agreement is enforceable because it satisfies the Statute of Frauds writing requirement as set forth in R.C. §1335.05 under the doctrine of partial performance.

{¶26} Appellant also asserts that, insofar as the trial court erred in holding that the oral listing agreement is enforceable against Appellant, the trial court also erred as a

matter of law in finding that the terms within the 2009 listing form are valid and enforceable against Appellant.

{¶27} Determining whether the trial court correctly applied the statute of frauds and the doctrine of partial performance is a matter of law. Our standard of review for questions of law is de novo. *Cuyahoga Cty. Bd. of Commrs. v. State*, 112 Ohio St.3d 59, 2006-Ohio-6499, 858 N.E.2d 330, ¶ 23. As such, we analyze these issues without deference to the trial court's decision.

{¶28} Ohio's statute of frauds is contained in R.C. Chapter 1335, which provides, in relevant part:

{¶29} R.C. §1335.04, which provides as follows:

{¶30} "No lease, estate, or interest, either of freehold or term of years, or any uncertain interest of, in, or out of lands, tenements, or hereditaments, shall be assigned or granted except by deed, or note in writing, signed by the party assigning or granting it, or his agent thereunto lawfully authorized, by writing, or by act and operation of law."

{¶31} Further, R.C. 1335.05 provides that:

{¶32} "No action shall be brought whereby to charge the defendant * * * upon a contract or sale of lands, tenements, or hereditaments, or interest in or concerning them * * * unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him or her lawfully authorized."

{¶33} The statute of frauds is essentially an evidentiary rule the purpose of which is to protect the integrity of certain enumerated contractual transactions. The statute requires that these transactions be in writing or accompanied by a memorandum

witnessing the transaction.” *Stickney v. Tullis-Vermillion*, 165 Ohio App.3d 480, 847 N.E.2d 29, 2006-Ohio-842, ¶ 22. If a contract falling under the statute of frauds is not properly memorialized in a signed writing, the effect of the statute is to render an otherwise valid contract unenforceable. *Id.* at ¶ 23, 847 N.E.2d 29.

{¶34} As set forth above, agreements for the sale of real estate come within the statute of frauds and must be in writing and signed by the party to be charged. R.C. 1335.05; *Shimko v. Marks* (1993), 91 Ohio App.3d 458, 461, 632 N.E.2d 990.

{¶35} In the case sub judice, the contract at issue is a real estate listing agreement. The right of a real estate agent to receive compensation for their services rests upon this listing contract. *Muirloch Realty, Inc. v. Periodical Charter & Leasing, Inc.* (Jan. 16, 1996) Tenth Dist. App. No. 95APE07-857.

{¶36} Upon review, we find that a listing agreement is essentially an employment contract for professional services and does not constitute a contract for the sale or transfer of real estate as contemplated by the Statute of Frauds.

{¶37} “A contract is generally defined as a promise, or a set of promises, actionable upon breach. Essential elements of a contract include an offer, acceptance, contractual capacity, consideration (the bargained for legal benefit and/or detriment), a manifestation of mutual assent and legality of object and of consideration.” *Minster Farmers Coop. Exchange Co., Inc. v. Meyer*, 117 Ohio St.3d 459, 884 N.E.2d 1056, 2008-Ohio-1259, ¶ 28.

{¶38} A meeting of the minds as to the essential terms of the contract is a requirement for enforcing the contract. *Episcopal Retirement Homes, Inc. v. Ohio Dept. of Indus. Relations* (1991), 61 Ohio St.3d 366, 369, 575 N.E.2d 134. A meeting of the

minds occurs when both parties “mutually assent to the substance of the exchange.” *Miller v. Lindsay-Green, Inc.*, 10th Dist. No. 04AP-848, 2005-Ohio-5803, ¶ 63, 165 Ohio App.3d 255, 846 N.E.2d 68.

{¶39} Based on the testimony heard at trial, the trial court found that in January, 2009, Appellant and Appellees entered into an oral listing agreement, which was to contain the same terms as the previous written listing agreement with Real Estate Showcase except that this listing agreement would expire on April 30, 2009. Appellees then attempted to memorialize their agreement in the 2009 written listing agreement which they sent to Appellant. Upon receipt of such written agreement, Appellant telephoned Appellee Crilow and discussed changes she wanted to make to their agreement that were not reflected in the written agreement. Appellant again indicated that she wanted the listing period to expire on April 30, 2009, and further wanted to include an incentive for a higher commission if the property sold within 30 days. Both parties orally agreed to these changes. Appellant made these, along with a few corrections to her name, address and phone number, in writing on the written listing agreement. Additionally, Appellant placed an “x” over the left-hand portion of the paragraph containing the protection period in the contract. Appellant then signed same and sent such modified agreement back to County Wide Realty.

{¶40} Upon receipt of the written agreement, County Wide placed such agreement into the file without signing it or reviewing the modifications.

{¶41} “It is the general rule that an offer, to become a binding contract, must be accepted.” 17 Ohio Jurisprudence 3d 459-460, Contracts, Sec. 27.

{¶42} Here, Appellees never made a formal written acceptance of such counter offer. Appellees did, however, perform under the oral agreement.

{¶43} Manifestation of mutual assent requires each party to make a promise or begin to render a performance. *McSweeney v. Jackson* (1996), 117 Ohio App.3d 623, 631, 691 N.E.2d 303. Such manifestation of assent may be made wholly or partly by written or spoken words, or by other acts or the failure to act. *Id.* Acceptance of an offer may be expressed by word, sign, writing or act. *Nilavar v. Osborn* (1998), 127 Ohio App.3d 1, 11, 711 N.E.2d 726.

{¶44} Based on the trial court's findings of fact concerning the actions of the parties, we find that the trial court could reasonably conclude that the parties did enter into a binding oral agreement which included those terms contained in the written listing agreement with Real Estate Showcase with the modifications as to the expiration date and the incentive provisions.

{¶45} Appellees, during the listing period orally agreed upon, showed Appellant's property to Michael Ballway. On September 4, 2009, Mr. Ballway and his wife purchased Appellant's property after the expiration of the listing agreement but within the protection period, as set forth in the original written Real Estate Showcase Contract and in the written agreement sent to Appellant by County Wide.

{¶46} As no new contract was ever accepted which removed the protection period, such protection period was still in effect when Mr. Ballway purchased Appellant's property. As such, Appellees were entitled to their commission based on such sale.

{¶47} Even assuming *arguendo* that we found that a real estate listing agreement was controlled by the statute of frauds, where "partial performance" exists, a

party who has accepted partial performance by another party under the contract will typically be barred from asserting the "Statute of Frauds" in order to avoid meeting its own contractual obligations. *L & M of Stark Cty., Ltd. v. LoDano's Footwear, Inc.* (2006) WL 3290797, 5 (Ohio App. 5 Dist.) (Ohio App. 5 Dist., 2006). Part performance of an oral contract for the sale of real estate can be sufficient to remove the contract from the operation of the statute. *Delfino v. Paul Davies Chevrolet, Inc.* (1965), 2 Ohio St.2d 282, 31 O.O.2d 557, 209 N.E.2d 194.

{¶48} Based on the foregoing, Appellant's assignments are overruled and we hereby affirm the judgment of the Municipal Court, Holmes County, Ohio, albeit on different grounds.

By: Wise, J.

Hoffman, P. J., and

Farmer, J., concur.

JUDGES

