IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

PHILIP BASKARON, Individually, Appellant, v. CAMERON ENTERPRISES, CAROLYN CHAWLA, individually, Respondents, KAUSHAL, INC.; NARESH KAUSHAL; RAVINDER P. KAUSHAL; SURUL CHAWLA, NAMIT CHAWLA, individually, Defendants.	)	No. 67116-2-I DIVISION ONE UNPUBLISHED OPINION FILED: January 22, 2013

Schindler, J. — Kaushal and Chawla, LLC entered into an agreement to manage three gas stations owned by Cameron Enterprises and Carolyn Chawla (Cameron). The agreement also granted Kaushal and Chawla, LLC a five-year option to purchase the gas stations. Philip Baskaron filed this action alleging Chawla agreed to pay him a commission for his assistance with the transaction. But Baskaron failed to submit any evidence tending to show the existence or terms of an alleged oral agreement. We affirm summary judgment dismissal of the lawsuit.

FACTS

Carolyn Chawla is the principal of Cameron Enterprises, which owns several ARCO AM/PM gas stations. In early 2007, after her husband died, Chawla decided to sell Cameron's five remaining gas stations, located in Bremerton, Poulsbo, Lynnwood, and Seattle. Cameron owned certain assets of the Seattle station, but not the underlying real property.

Baskaron is a commercial real estate agent and business broker. In late 2006, he helped Chawla's late husband and Cameron sell one of Cameron's gas stations, for which he received a commission. After Chawla's husband died, Baskaron offered to assist her in selling the remaining gas stations. Chawla and Baskaron did not enter into any written listing, brokerage, or employment agreement.

During 2007 and 2008, Baskaron prepared and presented to Chawla a series of purchase offers for some or all of the stations. Each of the written purchase offers specified Baskaron's commission if the transaction closed. None of the proposed transactions closed.

In August 2008, Baskaron prepared offers from Kaushal, Inc. to purchase four gas stations. At about this time, Baskaron introduced Chawla to Ravinder Kaushal and Naresh Kaushal, the principals of Kaushal, Inc. The total proposed purchase price was $9.7 million. Each of the offers provided for a six percent commission. Neither Kaushal, Inc. nor Chawla signed the offers.

Instead, Kaushal, Inc. submitted a proposed "Membership Purchase Agreement" (MPA) to Chawla. The offer contemplated that Chawla would form a limited liability company called Cameron Enterprises, LLC and transfer Cameron's five remaining gas stations to the LLC. Kaushal, Inc. would then purchase 20 percent of the membership interests of the LLC for $1 million, with an option to buy the remaining 80 percent for $8.7 million. The MPA, which was conditioned on approval of the bank and Chawla's counsel, does not contain a commission provision.

Although the parties signed the MPA, Chawla's counsel declined to approve the transaction, and it never closed. By letter dated October 7, 2008, Chawla's counsel notified the parties that he was not approving the transaction, but that he was preparing a "letter of intent" that would express Chawla's "interest" in turning over management of the stations to Kaushal, Inc., and granting Kaushal, Inc. an option to purchase the stations "upon terms which have been generally discussed by the parties." Counsel sent courtesy copies of counsel's disapproval of the MPA and the subsequent intent letter to Baskaron.

On October 27, 2008, Baskaron prepared and submitted the written offer from Kaushal, Inc. to purchase all of Cameron's assets in the Seattle station for $300,000. When the transaction closed, Cameron paid Baskaron the six percent commission specified in the written offer.

After the MPA transaction failed, some of the potential purchasers formed Kaushal and Chawla, LLC.[1] On December 10, 2008, Kaushal and Chawla, LLC

[1] The parties involved with Kaushal and Chawla, LLC are not related to respondent Carolyn Chawla.

entered into a "Management and Option Agreement" (MOA) with Cameron. Under the MOA, Kaushal and Chawla, LLC took over management of three stations located in Bremerton, Poulsbo, and Lynnwood. In exchange for a five-year option to purchase the three stations, Kaushal and Chawla, LLC paid Cameron $500,000 as an "Option Price Credit" to be applied to the $7,990,000 purchase price should it exercise the option. The MOA also provided that Kaushal and Chawla, LLC would make monthly option expense payments of $10,000 to $20,000. The MOA did not contain a commission provision. Kaushal and Chawla, LLC has not exercised the option to buy under the MOA, and Cameron remains the owner of the three stations.

On September 27, 2010, Baskaron filed this action for damages against Kaushal and Chawla, LLC,[2] Cameron, and Chawla, raising theories of breach of contract, intentional interference with business relationships, and negligence. Baskaron alleged the parties agreed that he would act as a business broker and agreed "to a brokerage fee of 6% of the total purchase of $9,700,000.00"

Cameron moved for summary judgment, arguing that there was no evidence of the alleged commission agreement and no evidence of the terms of such an agreement. Cameron further argued that the statute of frauds barred Baskaron's claim because there was no written commission agreement.

The trial court entered summary judgment in favor of Cameron and dismissed the lawsuit.

ANALYSIS

[2] Kaushal and Chawla, LLC was eventually dismissed from the action without prejudice.

Standard of Review

When reviewing a grant of summary judgment, an appellate court undertakes the same inquiry as the trial court. Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). We consider the evidence and all reasonable inferences in the light most favorable to the nonmoving party. Schaaf v. Highfield, 127 Wn.2d 17, 21, 896 P.2d 665 (1995). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c); White v. State, 131 Wn.2d 1, 9, 929 P.2d 396 (1997). A " 'complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.' " Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)).

Baskaron contends genuine issues of material fact as to the existence of an oral commission agreement with Cameron preclude summary judgment. The essential elements of a contract are the subject matter, the parties, the promise, the terms and conditions, and the price or consideration. DePhillips v. Zolt Constr. Co., Inc., 136 Wn.2d 26, 31, 959 P.2d 1104 (1998). A contract may be oral or written and may be "implied in fact with its existence depending on some act or conduct of the party sought to be charged." Bell v. Hegewald, 95 Wn.2d 686, 690, 628 P.2d 1305 (1981). In Washington, the parties to a contract must objectively manifest their mutual assent and must assent to sufficiently definite terms. Hoglund v. Meeks, 139 Wn. App. 854, 870,

170 P.3d 37 (2007). The party asserting the existence of a contract, whether express or implied, bears the burden of proving each essential element, including the existence of a mutual intention. Hollenback v. Shriners Hosps. for Children, 149 Wn. App. 810, 829, 206 P.3d 337 (2009).

To support his claim of an oral agreement, Baskaron relies primarily on (1) an August 2008 letter Chawla wrote to Baskaron's boss, complimenting Baskaron for "soldier[ing] on with all my five other stores;" (2) an undated letter from Chawla to Baskaron confirming her desire to sell all five of her stations, but to sell the Poulsbo station last; (3) a note from Chawla advising Baskaron of the telephone number of someone who stopped by the Seattle station and expressed a desire to buy a station; and (4) a declaration by attorney Jeffrey Laws describing in general terms a meeting between Baskaron and Chawla "[i]n the summer of 2008" and certain negotiations among unspecified parties, and asserting that "Mr. Baskaron was instrumental in negotiating the terms between the parties that ultimately resulted in the management option agreement."

The August 2008 communication is nothing more than a general letter of recommendation. Even viewed in the light most favorable Baskaron, that letter and Chawla's notes to Baskaron about two of her stations document nothing more than the undisputed fact that Baskaron was continuing his efforts to arrange the sale of Cameron's stations, and that Chawla was generally satisfied with those efforts. To that end, Baskaron prepared a number of written purchase offers, all of which contained a commission provision. Cameron accepted two of those offers for a sale, and paid

Baskaron the commission included in the written agreement.

In response to the summary judgment motion, Baskaron failed to submit any evidence to support his assertion that he "negotiated a new management and option agreement (MOA) between the parties [in October 2008]." Although Baskaron introduced Chawla to two of the principals of Kaushal, Inc. in August 2008, the introduction was in conjunction with his attempts to arrange a sale of the stations, and not the MOA.

Nothing in the record indicates the nature of Baskaron's role, if any, in the change of entities and participants involved in the MOA, in the relevant negotiations, or in the drafting of documents. Nor has he claimed he participated in any specific meetings or discussions with any of the participants about the MOA or about his commission.

The absence of any evidence about the terms of Baskaron's alleged commission is particularly significant. Baskaron's prior history of dealing with Cameron was limited to his preparation of written offers to purchase stations, each of which contained a commission provision. The MOA involved both an agreement for the management of the stations and a five-year purchase option. To date, the purchase option has not been exercised. Baskaron apparently claims that his six percent commission applies to all income arising from the purchase option throughout the life of the agreement. He has failed to present a shred of evidence that Chawla or anyone else agreed to such a provision.

Where, as here, the moving party has met its initial burden on summary

judgment by demonstrating the absence of evidence to support the nonmoving party's case, the nonmoving party

> may not rely on the allegations in the pleadings but must set forth specific facts by affidavit or otherwise that show a genuine issue exists. Additionally, any such affidavit must be based on personal knowledge

> admissible at trial and not merely on conclusory allegations, speculative statements or argumentative assertions.

Las v. Yellow Front Stores, Inc., 66 Wn. App. 196, 198, 831 P.2d 744 (1992). Baskaron correctly notes that a dispute about the existence of an oral agreement frequently involves credibility determinations that cannot be resolved on summary judgment. But the party opposing summary judgment

> "must be able to point to some facts which may or will entitle him to judgment, or refute the proof of the moving party in some material portion[;] the opposing party may not merely recite the incantation, 'Credibility,' and have a trial on the hope that a jury may disbelieve factually uncontested proof."

Amend v. Bell, 89 Wn.2d 124, 129, 570 P.2d 138 (1977) (quoting Rinieri v. Scanlon, 254 F. Supp. 469, 474 (S.D.N.Y. 1966)).

Because Baskaron failed to submit any evidence indicating the existence of an oral commission agreement or establishing the terms of the alleged agreement, the trial court properly dismissed his claims on summary judgment.

Baskaron also contends that he was the "procuring cause" of the MOA and that the statute of frauds does not apply to the commission agreement because the transaction involved the sale of a "business interest," not the sale of real property. Both of these contentions rest on the alleged existence of an enforceable oral commission agreement. Because Baskaron failed to demonstrate the existence of an oral

agreement, we do not consider these issues.

Affirmed.

WE CONCUR: