

DIVISION I

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
LARRY D. VAUGHT, Judge

CA06-69

August 30, 2006

HARVEY MANAGEMENT, LLC and
HARRY HARVEY
APPELLANTS

APPEAL FROM THE CRITTENDEN
COUNTY CIRCUIT COURT
[CV-2004-547]

V.

HON. VICTOR LAMONT HILL,
CIRCUIT JUDGE

MOHR PARTNERS, INC.
APPELLEE

REVERSED and REMANDED

Appellants Harvey Management, LLC and Harry Harvey contend that the trial court erred in its decision to grant summary judgment in favor of appellee Mohr Partners in this contract case where Mohr alleged breach, deceit, and fraud against Harvey. Specifically, Harvey argues that because it raised several disputed issues of material fact—most notably whether a contract existed between the parties to this suit—summary judgment was improper at this stage of litigation. We agree and reverse and remand for a trial on the issues.

Relevant to this appeal are the following facts. On December 16, 2002, Harry Harvey received a letter from an agent for Mohr Partners, Debra VanDerveer, stating that Mohr had “been authorized on a national basis to exclusively represent Renal Care Group in their effort to secure 6,195 rentable square feet for their space needs.” Three properties were identified by Mohr in a preliminary report that included photographs and location descriptions. The preliminary report, dated August 8, 2002, identified a property owned by Harvey at 2921 Highway 77 and described the space as follows: “This strip center has at least three medical

tenants. The 4,800 is within the center and the 5,000sf is a free-standing building on the site. There is a 6" water line into the center. The owner is highly motivated.” However, the December letter requested from Harvey a proposal “to lease space, 2895 Highway 77, Bella Vista Commons, Marion, Arkansas.” The property at 2895 Highway 77 was also owned by Harvey.

On December 20, 2002, Harry Harvey, the President of Harvey Management, LLC, signed a “Standard Commission Agreement” with Mohr Partners regarding a lease with Renal Care Group Inc. for the lease of property owned by Harvey located at 2895 Highway 77 in Marion, Arkansas. However, there is some dispute as to when the agreement was signed by the president of Mohr Partners, Robert Mohr. The typed date referenced in the agreement is 2002, but the written date under Mohr’s signature reads either “11-14-02” or “11-14-03.” The agreement identifies the property as “Bella Vista Commons.”

Additionally, a copy of email correspondence between VanDerveer and Renal Care Group, dated January 27, 2003, was also included in the record of this case. The email referenced Renal Care Group’s Marion, Arkansas, requirements and stated:

I’ve just spoken with Harry Harvey.

I leveled with him and said that RCG wanted to look at potential building sites. And, that I had gotten several parcels for review purposes late Friday, but, no due diligence work had been performed.

I told him RCG didn’t really like the age, etc. of his building, however, it could work if time to occupy needed to be accelerated. But now, that acceleration were [sic] not the case.

He indicated that RCG could have the “new” building. I said that I had thought that he couldn’t accommodate the size requirement in that building. HE (sic) said, “I can now.” 8,000 contiguous square feet can be assembled now. There are 1200 bays, all with non-bearing walls in between. And, room for truck access. These spaces are in the middle of the center.

Do you want to pursue this option with Harry?

Please advise.

DV

A representative of Renal Care Group responded: “If it is in the middle of the center I believe parking will be a problem.”

On July 23, 2003, Renal Care Group and Harvey entered into a lease for property at 2921 Highway 77. The lease specifically identifies Mohr Partners and provides that Harvey would be “solely responsible for the payment of all commissions” owed to Mohr “pursuant to this lease and/or any separate brokerage agreement as pertaining to this Lease.”

In addition to these documents the record contains an affidavit from Ted Fredricks, the current Mohr president, dated December 13, 2004. In his sworn statement Fredricks outlined the commission that Mohr was owed for “brokering” the July lease—five percent of the gross rental payable during the initial term of the lease. He also acknowledged that Harvey “takes the position that the Standard Commission Agreement was not signed until November 14, 2003.” He further acknowledged that the questionable number did “appear to be a three, but it is not completely clear.” He also stated that it has been suggested by Harvey that Mohr was not owed a commission because it had nothing to do with the negotiation of the lease. He responded that the Standard Commission Agreement stated that “Mohr Partners, Inc. ‘has been integrally and actively involved in the negotiations of the lease’ between Harvey Management, LLC and Renal Care Group.”

There was also an affidavit submitted by Harry Harvey. Harvey acknowledged that he entered into a commission agreement with Mohr for his property located at 2895 Highway 77. He further stated that he had no further communication with Mohr after hearing from VanDerveer that Renal Care Group was not interested in leasing his property. He averred that the property he leased Renal Care Group (located at 2921 Highway 77) was a separate, free-standing building not associated with the property set forth in the commission agreement. He

introduced tax records and plats to bolster this claim. He claimed that all negotiations relating to the lease of his building were handled by him and his attorney, James C. Hale III. He also stated that he subsequently became aware that Mohr was not licensed to practice real estate in Arkansas, but this fact was not disclosed to him prior to his signing of the agreement. He further stated that if Mohr was not licensed to practice real estate in Arkansas, then Mohr could not receive a commission and the disputed contract is a nullity.

After considering these documents, the trial court—without a hearing—entered summary judgment in Mohr’s favor finding that Mohr was entitled to judgment as a matter of law in the amount of \$34,923.05 plus interest at the rate of ten percent (totaling \$7,161.61). The court also awarded attorney’s fees in the amount of \$3,799.99. It is from this order that Harvey appeals.

In reviewing summary-judgment cases, we determine whether the trial court’s grant of summary judgment was appropriate based on whether the evidence presented by the moving party left a material question of fact unanswered. *Alberson v. Auto. Club Interinsurance Exch.*, 71 Ark. App. 162, 27 S.W.3d 447 (2000). The moving party is entitled to summary judgment if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is not a genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Id.* All proof submitted with a motion for summary judgment must be viewed in the light most favorable to the party resisting the motion, and any doubts and inferences must be resolved against the moving party. *McWilliams v. Schmidt*, 76 Ark. App. 173, 61 S.W.3d 898 (2001). Summary judgment is not appropriate where evidence, although in no material dispute as to actuality, reveals aspects from which inconsistent hypotheses might reasonably be drawn and

reasonable minds might differ. *Lee v. Hot Springs Vill. Golf Sch.*, 58 Ark. App. 293, 951 S.W.2d 315 (1997).

In this case, there are several material facts in dispute. First, there is a question as to which property was covered by the parties' commission agreement. The agreement stated that it covered the 2895 Highway 77 property, which was never leased. However, it also referenced the "Bella Vista Commons" complex, which includes the 2921 Highway 77 property that was actually leased. The agreement was produced after a group of three properties was identified by the Mohr group, one of which was the property that was eventually leased. Thus, there is an unresolved question as to the scope of the commission agreement.

Next, there is a question as to when the commission agreement was executed. The internal, type-written references in the agreement have a 2002 date; however, it appears that the contract was not actually signed by Mohr until November of 2003—three months after the lease for the 2921 property was executed. Therefore, there is also a question as to the existence of a contract and, assuming *arguendo* that a contract did exist, the time that Harvey became obligated to pay any brokering fees that were due Mohr for its services.

There is also a question as to whether Mohr provided any services for which it should receive a commission. Although Mohr makes much ado over the fact that Harvey identified Mohr by name in the actual lease and acknowledged that it would pay any fees owed to Mohr—it is not clear that Mohr provided any services for which payment would be owed. The record indicates that sometime in January of 2003 Harvey was told that the Renal Care Clinic was not interested in his property and that there was no further communication between Harvey and Mohr. The language in the actual lease referencing the payment of a commission to Mohr indicates that *if* a commission is owed, then Harvey will pay it. The

position of Mohr is that the “Standard Commission Agreement” obligates Harvey to pay—but the fact that there are questions as to the validity and scope of this agreement belies that conclusion.

Finally, there is a question as to whether the commission agreement was a nullity from the outset based on Harvey’s allegation that Mohr was not a licensed real estate agent in Arkansas and thus was not permitted to receive a real estate commission, thus making the commission agreement a nullity and void on its face based on the requirements of Ark. Code Ann. § 17-42-107 (Repl. 2001). However, in order to properly analyze this argument more information is required—specifically whether Mohr’s actions amounted to the “practice” of real estate and, if so, whether it was licensed to do so. In order to grant summary judgment in this case, the trial court was forced to make an impermissible conclusion either that Mohr was not engaged in the practice of real estate or that Mohr was licensed to practice real estate in Arkansas—both impossible conclusions based on the evidence presented at this stage of litigation.

Mohr responds alternatively that, in the event we conclude that there are unresolved material facts at issue in this case, we can affirm the summary-judgment grant using the procuring-cause doctrine. In *Atkins v. L.L. Cole & Son, Inc.*, 79 Ark. App. 124, 127, 84 S.W.3d 899, 901 (2002), our court discussed the doctrine:

the “procuring cause doctrine” can be used affirmatively to infer a contract between the broker and the principal by allowing the broker to show that his part of the contract was performed and the principal reaped a benefit, or defensively to prevent broker fraud. However, while the doctrine was applied in that case to determine that the real estate broker procured the cause of the sale and was entitled to a commission, the contract in that case was a nonexclusive contract, under which the broker was to receive a commission only if the property was sold to a prospect the broker procured.

Therefore, as evidenced by the language of our *Atkins* precedent, Mohr’s alternative argument is a nonstarter because a procuring-cause analysis is dependent on the terms of the

contract—which in this case is the primary source of the material, unresolved facts. In order to analyze the contract under this doctrine, we would be forced to resolve the following disputed, material facts—whether the agreement was valid, whether the scope of the agreement covered only the first property or any subsequent properties that Renal Care Group leased, and whether the properties were in the same building or contiguous to the property contemplated for lease in the commission agreement (a requirement for procuring-cause/third-party beneficiary analysis).

It is apparent that, in deciding whether to grant summary judgment, the trial court made several factual conclusions based on controverted evidence. However, in deciding whether to grant summary judgment, it is not the role of the trial court to weigh and resolve conflicting evidence, but to simply decide whether such questions exist to be resolved at trial. *See Adams v. Wolf*, 73 Ark. App. 347, 43 S.W.3d 757 (2001). Therefore, we reverse the award of summary judgment to Mohr and remand this case for trial.

Reversed and remanded.

HART and NEAL, JJ., agree.