

DIVISION III

ARKANSAS COURT OF APPEALS  
NOT DESIGNATED FOR PUBLICATION  
OLLY NEAL, Judge

CA06-259

October 11, 2006

DARRELL R. MAGBY AND  
DEBRA S. MAGBY  
APPELLANTS

AN APPEAL FROM THE FRANKLIN  
COUNTY CIRCUIT COURT  
[CV-04-108]

v.

ATKINSON REALTY, INC. AND  
CENTURY 21 HAYES REALTY  
APPELLEES

HONORABLE JOHN S. PATTERSON,  
JUDGE

AFFIRMED

Following an October 13, 2005, bench trial, the Franklin County Circuit Court entered a judgment finding that, pursuant to an Exclusive Right to Sell Agreement, appellants Darrell Magby and Debra Magby owed appellee Atkinson Realty, doing business as Century 21 Hayes Realty (Century 21), a real estate commission. On appeal, the Magbys argue that the trial court erred as a matter of law in reaching the conclusion that the de minimus contacts between Century 21 and Frank Corley were sufficient to constitute the procuring cause for the sale of real property to Mr. Corley and therefore, the awarding of a commission to Century 21 was in error. The Magbys also argue that the trial court erred when it determined that Century 21 was entitled to a full commission on the sale of the property to Mr. Corley on its claim of entitlement under a quantum meruit theory. We affirm.

The evidence at the bench trial established the following. The Magbys owned an eighty-acre tract of land in Franklin County. On September 9, 2003, desiring to sell the property, the Magbys entered into an exclusive right to sell agreement with Century 21. The agreement was to expire on March 9, 2004. The pertinent parts of the agreement provided:

7. LISTING AGENT FIRM'S FEE: If Listing Agent Firm presents to Owner an offer in an amount equal to or greater than the Offering Price, or such lesser price or terms as Owner may accept, or if the Property is otherwise sold or disposed of by Listing Agent Firm or any other person including Owner, during the listing period, Owner agrees to pay Listing Agent Firm a professional fee of: (i) Six percent (6%) of the gross amount of any accepted Real Estate Contract or value of any property exchanged for the Property; or (ii) \$ \_\_\_\_\_, for professional services rendered. In consideration for the Owner's promise contained within this paragraph 7, Listing Agent Firm promises to Owner that it will use reasonable effort to solicit an offer regarding the Property on terms and condition acceptable to Owner. Owner agrees that Listing Agent Firm is not required to investigate the financial or other ability of a prospective Buyer to consummate any proposed or accepted Real Estate Contract. Owner will not owe a fee to Listing Agent Firm if Buyer does not remove any condition set forth in a Real Estate contract and cannot close, unless failure to close is the fault of Owner.

....

10. EXPIRED LISTING CONDITIONS: Unless otherwise specified, Owner agrees to pay the profession fee set forth in Paragraph 7 to Listing Agent Firm if the Property is sold or otherwise disposed of directly or indirectly by any person including Owner during a period of 180 days after expiration or termination of this Exclusive Right to Sell Agreement (including termination by Listing Agent Firm pursuant to Paragraph 11 below) when any offer, offer and acceptance, or real estate contract was entered into during the term hereof, or *when information given by or obtained through Listing Agent Firm during the period of the listing resulted in or contributed in any manner to the sale or disposal of the Property, whether or not Listing Agent Firm was the procuring cause.* However, if Owner employs another real estate firm as exclusive agent for marketing the Property after expiration of this Exclusive Right to Sell Agreement, Owner shall pay only one professional fee, and that to the currently employed real estate firm, without limiting the original or previous Listing Agent Firm from seeking a share of such professional fee from the currently employed real estate firm through arbitration, or otherwise.

(Emphasis added.)

Two weeks before the agreement was set to expire, Wallace Corley saw the Century 21 sign on the Magby property and went to the real estate office to inquire about the property. There, Michelle Jones, a Century 21 agent, printed out the “spec sheet” on the property and gave it to Mr. Corley. He declined Ms. Jones’s offer to take him out to view the property.

On March 9, 2004, the agreement expired. Ms. Jones contacted Mr. Magby the following day to see if the Magbys wanted to re-list the property. Mr. Magby was non-committal in his answer.

Sometime after the parties’ agreement expired, Mr. Corley returned to Century 21’s office and inquired further about the property. Ms. Jones gave him a copy of the property survey and showed him the plat map. At that time, Mr. Corley again declined Ms. Jones’s offer to view the property. However, later that day, Mr. Corley returned and wanted to view the property. Because the parties’ agreement had expired, Ms. Jones first called Mr. Magby to obtain his permission to show the property.

On March 24, 2004, Mr. Corley made an offer to purchase the property for \$180,000. Ms. Jones called Mr. Magby and informed him of the offer. Because he and his wife were out of town, Mr. Magby said that they would discuss the offer and would come by the office when they returned home.

In the meantime, Chuck Atkinson, Century 21’s principal broker, had Ms. Green prepare a contract providing for a one month extension of the parties’ agreement. When the

Magbys came by, on March 26, to discuss the offer, Mr. Atkinson presented them with the contract for a one month extension. Mr. Magby refused to sign the contract. Because of Mr. Magby's refusal, Mr. Atkinson did not show the Magbys the offer or inform them who had made the offer. Ms. Jones testified that, after the Magbys left the office, she called Mr. Corley and gave him Mr. Magby's contact information and asked Mr. Corley to inform her if he was able to work something out with Mr. Magby.

However, Mr. Magby testified that, two days later, after learning from a cousin that Mr. Corley had purchased property in the area, he obtained Mr. Corley's information from a neighbor, and he called Mr. Corley to inquire if he would be interested in viewing the property. Mr. Corley agreed to view the property a second time. Mr. Corley eventually paid \$175,000 to purchase the property from the Magbys.

On July 29, 2004, Century 21 filed a complaint seeking a judgment against the Magbys for a real estate commission, pursuant to the "Exclusive Right to Sell Agreement," in an amount equal to six percent of the gross selling price of the property. In the alternative, Century 21 sought judgment on the basis of implied contract or quantum meruit. Century 21 also sought an award of pre-judgment interest, attorney's fees, and cost.

In a November 18, 2005, order the trial court awarded Century 21, a six percent commission (\$10,500) plus prejudgment interest, attorney's fees, and cost. The trial court specifically wrote:

[Century 21] is entitled to judgment against the [Magbys,] jointly and severally, on its claim set out in paragraph III of its complaint inasmuch as the court

finds that during the exclusive listing period set out in the Exclusive Listing Agreement introduced during the trial as [Century 21's] Exhibit "A", the ultimate purchaser of the real estate which formed the basis of the said Listing Agreement between [Century 21] and the [Magbys] (i) observed the Century 21 "for sale" sign near the property prior to the listing expiring and (ii) went to [Century 21's] office in Ozark, Arkansas, making inquiry about said property during the exclusive listing period whereupon the said purchaser was provided with a "specification sheet" regarding the [Magbys'] property. As a result of those facts, the court finds that [Century 21] is entitled to its commission under paragraph 10 of the Listing Agreement which provides that the commission is earned ". . . when information given by or obtained through Listing Agent Firm [Century 21] during the period of the listing *resulted in or contributed in any manner* to the sale or disposal of the Property... ."

(Emphasis in the original.) From that order, the Magbys now bring this appeal.

The standard of review of a circuit court's findings of fact after a bench trial is whether those findings are clearly erroneous. *Berry v. Cherokee Village Sewer, Inc.*, 85 Ark. App. 357, 155 S.W.3d 35 (2004). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. *Id.* Disputed facts and determination of the credibility of witnesses are within the province of the judge, sitting as the trier of fact. *Id.* However, we review questions of law de novo, as the trial court is in no better position than we are to answer a question of law. *Curley v. Old Reliable Cas. Co.*, 85 Ark. App. 395, 155 S.W.3d 711 (2004).

In their first argument on appeal, the Magbys assert that the trial court erred when it found that Century 21 was the procuring cause of the sale to Mr. Corley. However, Century 21 points out that, because the trial court's decision was based upon the express terms of the

parties' agreement and not upon the procuring cause, the Magbys' argument is misplaced. We agree that the Magbys' argument is misplaced. Here, the trial court's decision was based on paragraph ten of the parties' agreement.

The first rule of interpretation of a contract is to give the language employed the meaning that the parties intended, and the court must consider the sense and meanings of the words used by the parties as they are taken and understood in their plain, ordinary meaning. *Cranfill v. Union Planters Bank*, 86 Ark. App. 1, 158 S.W.3d 703 (2004). It is the duty of the court to construe a contract according to its unambiguous language without enlarging or extending its terms. *Id.* In regard to the construction of an agreement's terms, the initial determination of the existence of an ambiguity rests with the court. *Id.* Language is ambiguous when there is doubt or uncertainty as to its meaning or it is fairly susceptible of two interpretations. *Am. Investors Life Ins. Co. v. Butler*, 76 Ark. App. 355, 65 S.W.3d 472 (2002). When a contract is unambiguous, its construction is a question of law for the court. *Cranfill, supra.*

Here, the Magbys are not arguing that the agreement is unenforceable or that the agreement contained ambiguous language. Accordingly, we give the words of the agreement their plain and ordinary meaning.

Paragraph ten of the parties agreement provides, in pertinent part, that “*when information given by or obtained through Listing Agent Firm during the period of the listing resulted in or contributed in any manner to the sale or disposal of the Property*” the agent will remain

entitled to a professional fee.

The facts of this case establish that Mr. Corley first learned of the property after seeing Century 21's sign advertising that the property was for sale; this occurred prior to the expiration of the parties' agreement. He then sought information about the property from Century 21. Century 21 provided Mr. Corley with the information he requested and made arrangements for him to view the property. There was conflicting testimony as to whether Century 21 provided Mr. Corley with Mr. Magby's information and he contacted Mr. Magby or whether Mr. Magby obtained Mr. Corley's information from a third party and contacted Mr. Corley. It is the province of the fact finder to resolve issues concerning conflicting evidence and witness credibility. *Bank of Am. v. C.D. Smith Motor Co.*, 353 Ark. 228, 106 S.W.3d 425 (2003).

Under these facts, Century 21's efforts satisfied the prerequisites for recovery under the parties' contract. Therefore, we hold that the trial court did not err when it found that, pursuant to the "Exclusive Right to Sell Agreement," Century 21 was entitled to recover a commission in an amount equal to six percent of the gross selling price of the property.

The Magbys also argue that Century 21 was not entitled to recover under the theory of quantum meruit. Century 21 presented this argument to the trial court as an alternative theory of recovery. Because we hold that the trial court did not err when it found that Century 21 was entitled to recover a commission pursuant to the terms of the "Exclusive Right to Sell Agreement," we do not address the alternative theory of recovery.

Affirmed.

PITTMAN, C.J., and BIRD, J., agree.