IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

CHABBOTT PETROSKY COMMERCIAL REALTORS, LTD.,	)	
	)	C.A. 02C-10-036 (JTV)
Plaintiff,	)	
	)	
v.	)	
	)	
ANDREW M. WHELAN and KATHERINE M. WHELAN,	)	
	)	
Defendants.	)	

Submitted: February 1, 2005
Decided: July 29, 2005

Beth D. Savitz, Esq., Hudson, Jones, Jaywork, & Fisher, Dover, Delaware. Attorney for Plaintiff.

John Grady, Esq., Grady & Hampton, Dover, Delaware. Attorney for Defendant.

DECISION AFTER BENCH TRIAL

VAUGHN, President Judge

Chabbott Petrosky v. Whelan, et al.
C.A. No. 02C-10-036 (JTV)
July 29, 2005

The plaintiff, Chabbott Petrosky Commercial Realtors, Ltd., seeks a judgment against the defendants, Andrew J. Whelan and Katherine M. Whelan, in the amount of $60,000 for a realtor's commission allegedly due. After hearing the testimony of the witnesses at trial, examining the exhibits, and considering the submissions of counsel, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

On September 18, 2002, the defendants signed an Exclusive Listing Agreement authorizing the plaintiff, a realty company, to effect a sale of real property owned by the defendants, known as Crimson Stables, 27190 Morgnec Road, Chestertown, Maryland, for the sum of $750,000. The Agreement was dated September 19, 2002 and executed by the plaintiff on September 20, 2002.

The Listing Agreement gave the plaintiff the exclusive right to procure a purchaser of the property for a period of 30 days. It provided that after the expiration of said 30 day period, the Agreement could be terminated by either party. A dispute existed at trial as to whether a notice terminating the Agreement after the expiration of the initial 30 days must be given on 10 days notice or two days notice. I find this dispute to be factually irrelevant as all operative facts upon which my conclusions and decision rest occurred within the initial 30 days.

Pertinent portions of the Listing Agreement are set forth verbatim as follows:

> Seller agrees to pay Broker a commission of eight (8) % of the gross consideration for which said Property is sold or exchanged.
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> Said commission shall be paid if the Property is sold,

> conveyed, or Seller otherwise transfers or contracts to transfer legal or equitable title to the Property and within 365 days after the termination of this Listing Agreement or any extension thereof to anyone who inspected the property or had negotiations with the Seller, either through Broker or otherwise, prior to final termination of the Listing Agreement.
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> Said commission shall be paid if Broker (through Broker's efforts, and/or a Co-Operating Broker) procures an offer to buy the Property from a ready, willing, and able Buyer which meets the terms of this Agreement. The commission shall furthermore be paid in the event Seller fails or refuses to proceed to settlement after all terms and conditions of a completely executed Agreement of Sale has been fulfilled by a ready, willing, and able Buyer.
>
> Said sale may be contingent upon reasonable terms and conditions typical of similar transactions including but not limited to: Due diligence inspections, environmental inspections, appraisals, verifications and governmental approvals at Buyer's expense.

The defendants contend that the Listing Agreement was subject to certain oral conditions, including conditions that the sale of the property be handled in a confidential manner unknown to any local residents and that offers not be solicited from local residents. While I recognize that Mr. and Mrs. Whelan may have desired that any effort to sell the property be conducted in a discreet manner, I find that the Exclusive Listing Agreement contained the entire agreement between the parties.

On September 24, 2002, the plaintiff, acting through its agent, Julia Hopkins,

obtained a written offer to purchase the property from Roy Scott Mason for the sum of $725,000 with a $20,000 deposit. The offer followed what appears to be a common form of real estate contract containing ten pages in all. The offer was delivered to Mr. Whelan.

In a conversation with Ms. Hopkins, which occurred on or before September 27, 2002, Mr. Whelan rejected the offer. Ms. Hopkins and Mr. Whelan discussed possible terms of a second offer which might be forthcoming from Mr. Mason. Mrs. Whelan was not a party to that conversation. I find that Mr. Whelan made no counteroffer and no commitment concerning any new offer which Mr. Mason might make during his conversation with Ms. Hopkins.

On September 30 at 9:04 a.m., Mr. Whelan faxed to the plaintiff a letter dated September 28 which stated as follows:

> Dear Ms. Hopkins,
>
> Please be advised that our plans have changed. We have decided not to sell Crimson Stables Farm. Accordingly, we are rescinding our Exclusive Listing Agreement with you, effective immediately.

The letter was signed by both Mr. and Mrs. Whelan.

At trial Mrs. Whelan and Mr. Whelan testified as to certain personal and family difficulties with which they were coping during 2002, including during September of that year. I find that Mr. and Mrs. Whelan issued their letter of September 28 rescinding the Listing Agreement because of a sudden change of plans arising from issues relating to care of their son, Matthew.

After receipt, on September 30, of the September 28 letter, the plaintiff continued with its efforts to develop Mr. Mason as a buyer for the property. On September 30, 2002, Mr. Mason executed a new written offer which offered to purchase the property for the full listing price of $750,000 with a $50,000 deposit. This offer contained the following succession clause:

> This Agreement shall benefit and bind the parties hereto, their respective heirs, personal representatives, successors and assigns. In the event of Buyer's death, prior to final settlement, deposit will be returned to the Buyer's respective heirs, personal representatives, successors and assigns.

The first sentence of this succession clause had been contained in the September 24 offer. However, the second sentence was not contained in the September 24 offer. It was included for the first time in the September 30 offer. The September 30 offer provided that it was subject to the approval of the Seller, which must be obtained on or before 12:00 noon, October 4, 2002.

The September 30 offer was mailed to Mr. Whelan via federal express on October 1, 2002. Relying upon their letter of September 28, the defendants did not respond to the offer.

CONCLUSIONS OF LAW

Under the law of agency, a principal can terminate an agency agreement at any time with or without cause, even if doing so is a breach of the agency agreement.[1]

[1] Restatement (Second) of Agency § 118 (1958).

Thus, I conclude that the September 28 letter faxed to the plaintiff by the defendants was effective to terminate the Exclusive Listing Agreement that day. The plaintiff's contention that the Listing Agreement was irrevocable for the first 30 days is rejected.

I further conclude, however, that the defendants had no just cause to terminate the Exclusive Listing Agreement as they did on September 28, 2002, which was within the Agreement's 30 day initial term, and that their act of doing so was a wrongful breach of the Agreement.

The issue then becomes one of determining the plaintiff's remedy. The quoted language from the Agreement, set forth above, establishes four circumstances under which the plaintiff would be entitled to be paid a commission pursuant to the Agreement's terms. I summarize them from the quoted language as follows: (1) upon sale or other transfer of the property during the term of the agreement; (2) upon sale or other transfer of the property within 365 days after the termination of the Agreement to a person who inspected or had negotiations with the seller during the term of the agreement; (3) upon the plaintiff's procuring an offer to buy the property from a ready, willing, and able Buyer which meets the terms of the Agreement; and (4) upon the defendants' failure or refusal to proceed to settlement after all the terms and conditions of an executed sales agreement were fulfilled by a ready, willing and able buyer.

The first, second, and fourth circumstances do not apply in this case because the property was never sold and no sales agreement was ever executed. Only the third circumstance – that in which the realtor procures an offer from a ready, willing, and able Buyer which meets the terms of the listing agreement – might apply. I conclude,

however, that a commission was not earned under this circumstance. When the defendants terminated the Listing Agreement, the only offer in existence was the September 24 offer, which was for less than the listing price. While the plaintiff may have had an ethical obligation to forward the September 30 offer, as it did, the fact remains that the offer came after the Listing Agreement had been terminated. In addition, the September 30 offer did not "meet the terms of the [Listing] agreement," which included a provision that the offer be contingent only upon terms and conditions "typical of similar transactions." The new provision in the succession clause – that the deposit be returned to the buyer's heirs, personal representatives, successors and assigns in the event of his death prior to settlement – is not a term or condition "typical of similar transactions." It had the effect of making the agreement contingent upon the buyer's survival. The succession clause typical of similar transactions is the one in the first offer, consisting of the one sentence which provided simply that the offered contract was binding not only upon the parties, but upon their respective heirs, personal representatives, successors and assigns. The addition of the new provision in the succession clause in the September 30 offer was material. Under this added provision, the defendants would have been required to return Mr. Mason's $50,000 deposit if he died in the intervening period between execution of a contract and final settlement. Under the typical succession clause, the one contained in the succession clause of the September 24 offer, the defendants would be entitled to invoke paragraph 17 of the offer, which allows them to retain the deposit if the buyer's estate failed to complete settlement. The point is that the defendants would have been entirely within their rights to reject the September 30 offer under the terms

of the Listing Agreement without incurring any liability for a commission. The fact that Mr. Mason in fact lived beyond the settlement date anticipated by his offers is irrelevant. The result is that no offer which "meets the terms of this Agreement" ever existed.

The next question is whether the plaintiff should be awarded a commission on the theory that the defendants' wrongful breach of the Listing Agreement prevented the plaintiff from continuing negotiations with Mr. Mason (or with a new prospective purchaser who might have come along in the initial 30 day listing period) to the point at which an offer which did fully meet the terms of the Listing Agreement would have been forthcoming. I conclude that the plaintiff has not established that further negotiations would have resulted in the plaintiff's securing an offer which met the terms of the listing agreement. As mentioned, the defendants would have been within their rights to reject the September 30 offer. Based upon Mr. Mason's testimony, and I so find, he considered the survivability provision in the succession clause of the September 30 offer to be material. He also testified that he would not have wanted to buy the property if he had been informed that the defendants had experienced a change of plans and no longer wanted to sell. Although Mr. Mason was a flexible potential buyer in some respects, I conclude that any assessment as to whether he would have made a third offer, one which met the terms of the Listing Agreement, is speculative.[2] I conclude that the plaintiff has failed to meet its burden of

[2] *R.E. Haight & Assoc. v. W.B. Venebales & Sons*, 1996 Del. Super. LEXIS 445 (citing *ROI, Inc. v. E.I. DuPont de Nemours & Co., Inc.*, 1989 Del. Super. LEXIS 447 (plaintiff required to prove its damages by a preponderance of the evidence beyond the level of speculation));

establishing that it is entitled to an 8% commission.

An independent grounds also exists for denying the plaintiff's claim for a realtor's commission. I conclude that Maryland law applies in this case because the property involved was in Maryland. Section 17-534 of the Business Occupations and Professions title of the Maryland code requires that a real estate brokerage agreement, which I conclude includes the Listing Agreement involved in this case, "shall . . . contain a provision for the cancellation of the brokerage relationship by either the client or the broker." Neither party has been able to cite any case in which this statutory provision is discussed or any legislative history or information which bears on the provision. Thus, I am presented with the bare words of the statute. From this I conclude that "cancellation" means premature termination of the agreement, such as occurred in this case, because a separate provision in the same statute also requires that the agreement have a definite termination date. No cancellation clause was contained in the Listing Agreement involved in this case. A cancellation clause may have addressed the resulting rights and liabilities of the parties in the event of a cancellation. Because the plaintiff selected a form of Listing Agreement which failed to comply with Maryland law on a point directly related to what occurred in this case – cancellation of the agreement by the client – I conclude that the plaintiff cannot benefit from the cancellation on the facts of this case by obtaining a commission.

The defendants contend that the plaintiff should be denied a commission

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Restatement (Second) of Contracts § 352 (1981)("Damages are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty.").

because the Listing Agreement fails to comply with Maryland law in other respects. However, the other alleged violations of Maryland law are not material to the facts of this case, and I reject the defendants' arguments which are based on provisions of Maryland law other than § 17-534.

Finally, I conclude that the plaintiff should be compensated for the reasonable value of the services which it performed in its efforts to sell the defendants' property. If the plaintiff wishes to submit a claim for compensation for the reasonable value of its services, it may do so by filing a written claim for such within 60 days of the date of this decision. The defendants may then respond in writing to the plaintiff's written claim within 20 days after service of the claim. I will then decide whether a further hearing is needed.

The plaintiff's prayer for a judgment against the defendants in the amount of $60,000 on account of a realtor's commission is ***denied.***

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr.
President Judge Vaughn

oc: Prothonotary
cc: Order Distribution
File