DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

HOMEWARD REAL ESTATE, INC.,

Appellant,

v.

HUSSIEN SHOUBAKI and HANI SHOUBAKI,

Appellees.

No. 2D21-2512

June 24, 2022

Appeal from the County Court for Hillsborough County; James S. Moody, III, Judge.

George A. Vaka and Nancy A. Lauten of Vaka Law Group, Tampa, for Appellant.

J. Carlton Mitchell of Older Lundy Alvarez & Koch, Tampa, for Appellees.

LUCAS, Judge.

A real estate broker, Homeward Real Estate, Inc. (Homeward), appeals a final summary judgment entered in favor of its former

clients, Hussein and Hani Shoubaki. For the reasons that follow, we reverse.

The Shoubakis owned a parcel of residential property in Tampa and wished to sell it. On May 31, 2018, they entered into an Exclusive Right of Sale Listing Agreement with Homeward.[1] This listing agreement gave Homeward the exclusive right to sell the property on behalf of the Shoubakis at a price not less than $549,000. The agreement's "Termination Date" was originally set for November 30, 2018, but it was extended through May 15, 2019.[2]

Paragraph 8 of the listing agreement sets forth the conditions under which the Shoubakis would be obligated to pay Homeward a commission. In pertinent part, paragraph 8 states:

> Seller will compensate Broker as specified below for procuring a buyer who is ready, willing, and able to purchase the Property or any interest in the Property on

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[1] The agreement was drafted utilizing a standard Florida Association of Realtors form.

[2] It appears there was a typographical error entered into the listing agreement when the parties extended its original term of May 30, 2018, through November 30, 2018, to May 15, 2019. The parties apparently utilized a word processing strike-through and text addition that altered both the beginning date and the Termination Date of the listing agreement. In the proceedings below, and before this court, the parties appear to have recognized that the revised Termination Date was intended to be May 15, 2019.

> the terms of this Agreement or any other terms acceptable to Seller. Seller will pay Broker as follows (plus applicable sales tax): 5% . . . of the total purchase price . . . .
>
> . . . .
>
> (d) Broker's fee is due in the following circumstances: (1) If any interest in the Property is transferred, whether by sale, lease, exchange, governmental action, bankruptcy, or any other means of transfer, regardless of whether the buyer is secured by Seller, Broker, or any other person. (2) If Seller refuses or fails to sign an offer at the price and terms stated in this Agreement, defaults on an executed sales contract, or agrees with a buyer to cancel an executed sales contract. (3) If, within 30 days after Termination Date ("Protection Period"), Seller transfers or contracts to transfer the Property or any interest in the Property to any prospects with whom Seller, Broker, or any real estate licensee communicated regarding the Property before Termination Date. However, no fee will be due Broker if the Property is relisted after Termination Date and sold through another broker.

Homeward procured a prospective buyer for the Shoubakis' property. The prospective buyer and the Shoubakis executed a sales contract on May 24, 2019, with a closing to occur on August 1, 2019. For reasons that are not entirely clear (and appear to be in dispute), the Shoubakis failed to close with the prospective buyer.

Believing that it was entitled to its commission, Homeward filed a lawsuit for breach of contract against the Shoubakis in the Hillsborough County Court. While the litigation was pending, on

March 9, 2020, the Shoubakis retained a new real estate broker. This new broker procured a different buyer, and on April 25, 2020, the Shoubakis and this new buyer entered into a sales contract. On May 28, 2020, (while Homeward's breach of contract complaint was still in litigation) the Shoubakis closed on the sale of their property to this new buyer.

The Shoubakis sought summary judgment on Homeward's complaint. In their arguments before the county court, the Shoubakis acknowledged that Homeward had procured a buyer for the property. However, according to the Shoubakis, the last sentence of paragraph 8(d) (what we will call the "However Clause") ended their obligation to pay Homeward its brokerage commission because their property was relisted after the 30-day protection period following the listing agreement's Termination Date and was ultimately "sold through another broker." Homeward argued that the procurement of the buyer and the Shoubakis' subsequent failure to close on the property gave rise to Homeward's right to a brokerage commission under paragraph 8(d)(2) of the listing agreement. Homeward contended that the However Clause at the end of paragraph 8(d) would only apply if Homeward had failed to

procure a buyer and the property was relisted and sold by another broker after the conclusion of the protection period following the Termination Date. Homeward further argued that the Shoubakis could not rely upon the However Clause in any manner because they had breached the listing agreement—and Homeward had filed its breach of contract action—before the clause could have been implicated.

The county court agreed with the Shoubakis' interpretation, albeit with some misgivings. In granting summary judgment in favor of the Shoubakis, the court observed:

> Even if Plaintiff's claim that a commission was earned during the contract is true, because the Defendants relisted the property at issue in this case with another broker at least thirty (30) days after the "Termination Date" of the contract and sold the property through that broker, the Court finds no commission is due to Plaintiff[] because paragraph 8 of the Exclusive Right of Sale Listing Agreement states that "no fee will be due Broker if the Property is relisted after Termination Date and sold through another broker."

The county court thereafter entered a final judgment in favor of the Shoubakis, which Homeward now appeals.

Because this case was decided by summary judgment, our review is de novo. *Williams v. State Farm Fla. Ins. Co.*, 47 Fla. L.

Weekly D633, D634 (Fla. 2d DCA Mar. 16, 2022) (citing *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000)). The arguments on appeal revolve around the interpretation of a contract, an issue that is subject to de novo review. *Schmidt v. Sabow*, 331 So. 3d 781, 788 (Fla. 2d DCA 2021) (citing *On Target, Inc. v. Allstate Floridian Ins. Co.*, 23 So. 3d 180, 182 (Fla. 2d DCA 2009)).

The parties offer two competing visions for how paragraph 8(d)—and more specifically, the However Clause at the end of that paragraph—ought to be interpreted. Homeward contends that the clause "simply provides that no broker's fee is owed the original broker when he fails to procure a willing and able buyer by the termination date of the Listing agreement, and after the termination date the property is relisted and sold by another broker." According to Homeward, its entitlement to a commission had fully ripened when the Shoubakis failed to close with its buyer—notwithstanding the Shoubakis' subsequent relisting of the property through another broker. The Shoubakis maintain "that a plain reading of the provision, using simple and common rules of grammar, shows that provision unambiguously states that the listing and sale of the

property after termination relieves Appellees of the obligation to pay [Appellant] a fee in every instance." As the Shoubakis would have it, the However Clause effectively trumps any of paragraph 8(d)'s three enumerated sub-paragraphs that would give rise to a commission's entitlement—so long as the clause is implicated by relisting and selling the property through another broker.

Both sides maintain that the other side's interpretation could result in an absurd construction of the contract: according to Homeward, the Shoubakis' interpretation would mean that the broker could be "stiffed in the end by [a] defaulting seller" even though the broker had fully performed its obligation and was entitled to a commission; the Shoubakis counter that Homeward's interpretation "would allow the broker to claim a fee whenever the property is transferred, regardless of who procured the buyer and how far in the future the transaction occurs."

We need not decide whose view is correct. Because even if the Shoubakis were right that relisting and selling the property through another broker after the agreement's termination could implicate the However Clause (and thwart Homeward's entitlement to a commission under any of paragraph 8(d)'s enumerated conditions),

there was a material fact in dispute as to whether the Shoubakis could have relied upon that clause. *See Beezley v. Deutsche Bank Nat'l Tr. Co., as Tr. for New Century Home Equity Loan Tr. Series 2004-A Asset Backed Pass-Through Certificates, Series 2004-A*, 336 So. 3d 814, 816-17 (Fla. 2d DCA 2022) (" 'Summary judgment should only be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.' The movant is entitled to summary judgment after irrefutably establishing that the nonmovant cannot prevail." (citation omitted) (quoting *Young v. Nationstar Mortg., LLC*, 205 So. 3d 790, 792 (Fla. 2d DCA 2016))); *Campbell v. Riggs*, 310 So. 3d 68, 70 (Fla. 4th DCA 2021) ("[A] party moving for summary judgment must conclusively show the absence of any genuine issue of material fact and obligates the trial court to draw every reasonable inference in favor of the non-moving party." (alteration in original) (quoting *Knight Energy Servs., Inc. v. Amoco Oil Co.*, 660 So. 2d 786, 788 (Fla. 4th DCA 1995))).[3]

[3] As in *Beezley*, the final summary judgment at issue here predates the Florida Supreme Court's recent amendment of Florida Rule of Civil Procedure 1.510(c)'s standard, and so we consider this

Homeward submitted evidence that the Shoubakis were the first to breach the listing agreement and that they did so before the However Clause could have been implicated. Indeed, Homeward had filed its breach of contract lawsuit before the Termination Date occurred. As such, summary judgment could not be entered in the Shoubakis' favor on the facts before the county court. *See generally Franconia Assocs. v. United States*, 536 U.S. 129, 142-43 (2002) ("Failure by the promisor to perform at the time indicated for performance in the contract establishes an immediate breach."); *Hanover Realty Corp. v. Codomo*, 95 So. 2d 420, 423 (Fla. 1957) (" '[W]here a party contracts for another to do a certain thing, he thereby impliedly promises that he will himself do nothing which will hinder or obstruct that other in doing the agreed thing,' and that 'one who prevents or makes impossible the performance or happening of a condition precedent upon which his liability by the terms of a contract is made to depend cannot avail himself of its nonperformance.' " (quoting 7 Fla. Jur. *Contracts* §§ 145, 148)); *Knowles v. Henderson*, 22 So. 2d 384, 385-86 (Fla. 1945) (holding

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appeal under the pre-amendment version of the rule. 336 So. 3d at 816 n.1.

that a broker is entitled to recover its commission if it procures a ready, able, and willing purchaser and the seller defeats the transaction through no fault of the broker or the buyer, "the strict terms of the contract between principal and broker as to completing the sale or procuring a binding contract of purchase from the customer being deemed waived by the principal"); *Waters v. Key Colony E., Inc.*, 345 So. 2d 367, 367 (Fla. 3d DCA 1977) ("A party to a contract cannot take advantage of his own wrongdoing to avoid responsibility thereunder." (citing *Walker v. Chancey*, 117 So. 705 (1928); *Chatlos v. Morse Auto Rentals, Inc.*, 183 So. 2d 854 (Fla. 3d DCA 1966); *Ballard v. El Dorado Tire Co.*, 512 F.2d 901 (5th Cir. 1975); 7 Fla. Jur. *Contracts* §§ 147, 148).

"Generally, whether there has been a breach of the terms of the contract is a question of fact, and the issue of whether there is a defense that excuses the breach is typically a question of fact." *Ness Racquet Club, LLC v. Ocean Four 2108, LLC*, 88 So. 3d 200, 203 (Fla. 3d DCA 2011) (citing 23 Williston on Contracts § 63:15 (4th ed.)). So it is with the case at bar. Accordingly, we reverse the summary final judgment below and remand for further proceedings consistent with this opinion.

Reversed and remanded.

LaROSE and ROTHSTEIN-YOUAKIM, JJ., Concur.

Opinion subject to revision prior to official publication.