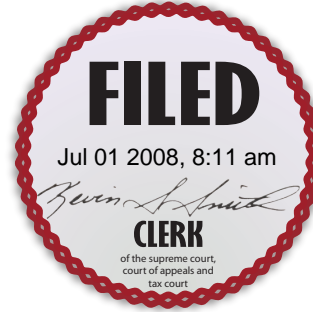


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

DEBRA BYRUM,)

Appellant-Plaintiff,)

vs.)

No. 18A02-0711-CV-1003)

BOOKOUT PROPERTIES, INC.,)

Appellee-Defendant,)

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable John Feick, Judge
Cause No. 18C04-0512-PL-66

July 1, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Debra Byrum appeals the trial court's order denying her request for unpaid commissions earned before Bookout Properties terminated her employment. Specifically, Byrum maintains that the trial court erred as a matter of law by concluding that her written commission schedule did not satisfy the "signed and written" requirement of the Statute of Frauds, specifically, Indiana Code § 32-21-1-10. Concluding that her written commission schedule satisfies Indiana Code § 32-21-1-10, we reverse and remand.

Facts and Procedural History¹

In September 2003, Byrum was hired as a part-time salesperson for Bookout Properties, Inc. ("Bookout"). Bookout is a real estate development company that owns land and then builds homes upon the land that it owns. As a part-time salesperson, Byrum did not have a realtor's license. In March 2004, Byrum began working for Bookout on a full-time basis. Soon thereafter, Byrum obtained a realtor's license "[b]ecause our office was participating in the MLS System, Multiple Listing System, and in order to do that, you had to have a realtor's license." Tr. p. 9.

During 2004 and 2005, Byrum and Melanie Cummings were Bookout's only two salespersons. According to Bookout's "2005 Sales Commission Bonus Program"

¹ We remind Bookout that the Statement of Facts is to be a narrative statement of facts and is not to be argumentative. Ind. Appellate Rule 46(A)(6); *Parks v. Madison County*, 783 N.E.2d 711, 717 (Ind. Ct. App. 2002), *reh'g denied, trans. denied*. Further, Byrum's appendix does not include her complaint or Bookout's answer and counterclaim. We direct counsel's attention to Indiana Appellate Rule 50(A)(2)(f), which requires that the appellant include in the appendix "pleadings and other documents from the Clerk's Record in chronological order that are necessary for resolution of the issues raised on appeal[.]" These important documents should be included in the appendix.

(“written commission schedule”), Byrum’s job responsibilities included, but were not limited to, the following:

Oversee sales budget, Coordinate all advertising, manage sales assistants, Coordinate all selections in design center, Work on model home and sales office merchandising, Ensure pricing and standard features are up to date, Set up system to track prospects (Outlook), Coordinate new brochures and direct mail, Manage and oversee the web page, Work from an open model and have a model open on weekends, Attend continuing education. Maintain MLS, Realtor and Mortgage rep. cooperation, Train new hires, Update [Homeowner’s Manual].

Appellant’s App. p. 69. In addition to earning a salary, Byrum and Cummings equally split commissions on the properties that either one of them sold. Byrum received commissions based on the number of homes under contract and earned commissions once a contract for a house was signed even though she did not receive an actual commission until the house was sold. Tr. p. 19. Byrum’s commission schedule was tiered so that her commissions proportionally increased as the number of homes she or Cummings sold increased. From the time Byrum began as a full-time employee, Bookout followed this commission schedule.

On July 14, 2005, Toni Bookout, one of the owners of Bookout, called Byrum at her home on her day off and asked her to come to the office to have a meeting with her and another one of the owners, William Bookout. At the meeting, Toni informed Byrum that she was being terminated due to financial issues the company was experiencing. At the time that Byrum was terminated, she claimed that Bookout owed her commissions for eleven properties that were sold before her termination. Believing that Byrum was only owed commissions for three sold properties, Bookout sent her three commission checks.

Thereafter, Byrum brought suit against Bookout to collect the remaining commissions, and a bench trial ensued.

At trial, Byrum testified that Toni informed her “they were going to continue to pay [her] for the houses that [she] had already sold with [Cummings] to date, and they would be sending those checks to [her] as they closed, which was the normal way for [them] to receive payment.” *Id.* at 16. According to Byrum, Toni also told her that

they were redoing things there in the office, and she might have a part-time job available. She said it probably would only be about thirty hours a week. She said she thought she could only pay about \$10.00, but there wouldn't be any benefits. I wouldn't have my insurance, I wouldn't have a 401(k). She explained that the job would basically be the same, though they would want me to continue to do everything that I had been doing, but she knew it was going to be hard for me as a single mom to take that type of position, then, again, talked to me about the unemployment and reassured me about the future checks coming.

Id. At the conclusion of the trial, the trial court entered its order, which includes *sua sponte* findings of fact and conclusions thereon. The order provides, in relevant part:

5. That [Byrum] is seeking a commission for the sale of real estate.
6. That I.C. 32-21-1-10^[2] deals with contracts and the procurement of purchasers.
7. That the *Galvin* case relied on by [Byrum] at 616 N.E.2d 1048 dealt with an amended statute that left out the language “finding or procuring by one person.”^[3]
8. That the current statute was enacted in 2002 and governs this transaction.

² This statute, formerly found at Indiana Code § 32-2-2-1, sets forth the writing requirements regarding conveyance procedures for real property.

³ While it is true that former Indiana Code § 32-2-2-1 is now codified under 32-21-1-10, the trial court was incorrect that the previous statute left out the language “finding or procuring by one person.” Both versions of the statute contain this language.

9. That once [Byrum] became a licensed real estate sales person, I.C. 25-34.1-3-2, et. seq., would apply, and although the Court has empathy for [Byrum], she has failed to meet her burden of proof on the complaint.^[4]

* * * * *

IT IS, THEREFORE, CONSIDERED, ORDERED, ADJUDGED AND DECREED BY THE COURT that [Byrum] take nothing by way of her complaint

Appellant's App. p. 8. Byrum now appeals.

Discussion and Decision

On appeal, Byrum maintains that the trial court erred in concluding that the written commission schedule does not satisfy the Statute of Frauds, specifically, Indiana Code § 32-21-1-10. Whether a writing satisfies the Statute of Frauds is a question of law for the court. *Gibson County Farm Bureau Co-op. Ass'n v. Greer*, 643 N.E.2d 313, 320 (Ind. 1994). Accordingly, our review of this question is *de novo*. See *Goodwine v. Goodwine*, 819 N.E.2d 824, 828 (Ind. Ct. App. 2004).

Indiana Code § 32-21-1-10 provides, in pertinent part:

A contract for the payment of any sum of money or thing of value, as a commission or reward for the finding or procuring by one (1) person of a purchaser for the real estate of another, is not valid unless the contract is in writing and signed by the owner of the real estate or the owner's legally appointed and duly qualified representative.

“The statute is to protect owners against fraud; it is not to be used by *owners* to perpetrate a fraud on the one seeking a commission.” *First Federal Sav. Bank of Ind. v. Galvin*, 616 N.E.2d 1048, 1055 (Ind. Ct. App. 1993), *trans. denied*. “In an action for commissions against the owner of real estate sold, a substantial compliance with the terms of the statute will be required.” *Price v. Walker*, 43 Ind. App. 519, 88 N.E. 78, 79 (1909).

⁴ Indiana Code § 25-34.1-3-2 prohibits unlicensed individuals to act as real estate brokers.

Byrum maintains that the written commission schedule prepared and followed by Bookout is sufficient to satisfy Indiana Code § 32-21-1-10. We agree. In support of her argument, Byrum relies on *Galvin*. In *Galvin*, Galvin’s friend and president of a bank agreed, in writing, to pay him a 7% commission if he found a purchaser for a strip mall secured by the bank in a foreclosure action. When Galvin eventually found a purchaser, the bank offered only a 5% commission. On appeal, a panel of this Court addressed whether certain writings were sufficient to satisfy Indiana Code § 32-21-1-10. Because it was undisputed that the bank had agreed to pay Galvin a commission, we concluded that the crux of the disagreement was not whether a contract existed, but rather whether the amount of the commission was contingent on a certain purchase price. Although the writings in *Galvin* were minimal and not signed by the bank, we held that where the bank “clearly agreed to pay Galvin a commission and Galvin performed his part of the bargain, [Ind. Code § 32-21-1-10] does not operate to prevent enforcement of the agreement against [the bank].” *Galvin*, 616 N.E.2d at 1056.

In applying *Galvin* to the facts of this case, we conclude that because Bookout clearly agreed to pay Byrum a commission once a contract for a house was signed and Byrum performed her part of the bargain, Indiana Code §32-21-1-10 does not operate to prevent enforcement of the agreement. Here, we have a written commission schedule that sets forth a tiered payment structure ensuring that Byrum’s commissions proportionally increase as the number of homes she or Cummings sells increase. From the time Byrum began as a full-time employee, Bookout followed this commission schedule, and neither party denies that this writing sets forth the agreement between the

parties. As a matter of law, Bookout’s written commission schedule satisfies Indiana Code § 32-21-1-10. We therefore reverse and remand.⁵

We stress that our opinion today is limited to our determination that Bookout’s written commission schedule satisfies Indiana Code § 32-21-1-10. Indeed, this is the only issue that the trial court addressed in its order. We are mindful that on remand the trial court will be asked to address the application of Indiana’s Wage Payment Statute,⁶ an issue Bookout developed in its brief on appeal. On remand, we instruct the trial court to address this fact-sensitive issue with the following general framework in mind.

The Wage Payment Statute governs both the frequency and amount an employer must pay its employees. *Naugle v. Beech Grove City Sch.*, 864 N.E.2d 1058, 1062 (Ind. 2007). Indiana Code § 22-2-5-1(a) provides that “[e]very person, firm, corporation, limited liability company, or association, their trustees, lessees, or receivers appointed by any court, doing business in Indiana, shall pay each employee at least semimonthly or biweekly, if requested, the amount due the employee.” Indiana Code § 22-2-5-1(b) provides that “[p]ayment shall be made for all wages earned to a date not more than ten (10) business days prior to the date of payment.” “An employer who fails to make payment of wages to any employee as provided in Indiana Code section 22-2-5-1 is

⁵ Bookout maintains that Byrum is not entitled to the claimed compensation because “the compensation claimed is part of a ‘2005 Sales Commission Bonus Program’ that required [Byrum] to satisfactorily perform the duties required for her to receive the additional compensation and many of her shortcomings were discovered after [Byrum] was laid off.” Appellee’s Br. p. 2. We find no merit to this argument. Nowhere in Bookout’s 2005 Sales Commission Bonus Program writing does it contain any language indicating that Byrum had to “satisfactorily perform specified duties” in order to receive her commissions. Moreover, when asked at trial whether Byrum or Cummings was “to get paid this bonus, or any type of commission or anything, if they didn’t do the things that were on the [2005 Sales Commission Bonus Program],” Tr. p. 66, Toni replied, “Yes, they were. They were going to get paid that if they didn’t do the things on the list” *Id.*

⁶ Ind. Code §§ 22-2-5-1 to 22-2-5-3.

subject to liquidated damages and attorney fees.” Ind. Code § 22-2-5-2; *Naugle*, 864 N.E.2d at 1063. Indiana Code § 22-2-9-1(b) defines “wages” for purposes of the Wage Payment Statute as “all amounts at which the labor or service rendered is recompensed, whether the amount is fixed or ascertained on a time, task, piece, or commission basis, or in any other method of calculating such amount.” “As a general rule, a person employed on a sales commission basis is entitled to commissions when the order is accepted even if the employee is terminated before payment is made.” *J. Squared, Inc. v. Herndon*, 822 N.E.2d 633, 637 (Ind. Ct. App. 2005). Due to “the plain language of the statute and the public policy behind it . . . there is no good faith exception to the Wage Payment Statute.” *Naugle*, 864 N.E.2d at 1066.

Reversed and remanded.

MAY, J., and MATHIAS, J., concur.