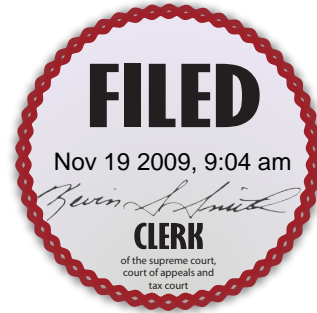


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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DOMUS PROPERTIES, LLC., )

Appellant, )

vs. )

JASON COOK )

Appellee. )

No. 71A03-0907-CV-296

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APPEAL FROM THE SAINT JOSEPH SUPERIOR COURT  
The Honorable David C. Chapleau, Judge  
Cause No. 71D06-0512-PL-470

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**November 19, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**FRIEDLANDER, Judge**

Domus Properties, L.L.C. (Domus) appeals the trial court's grant of partial summary judgment in favor of Jason Cook on Cook's claim for a real estate commission. Domus presents the following consolidated and restated issue for review: Did the trial court err in granting partial summary judgment?

We affirm.

For purposes of summary judgment, the facts are undisputed. Jason Cook was a licensed real estate agent working with broker Coldwell Banker-Anchor Real Estate (Coldwell Banker) as an independent contractor from December 2003 until his termination in December 2004. In April 2004, Domus entered into an exclusive listing contract with Coldwell Banker to list for sale thirty-seven rental properties in South Bend. Cook was the listing agent under the contract. The listing contract was in effect from April 16, 2004, through July 16, 2004, and provided the following regarding the broker's fee:

*In the event the Broker finds a purchaser ready, willing and able to buy said real estate, or should said real estate be sold by or through the Broker, the Seller or otherwise, during said time for the price upon the terms named herein, or for any other price or terms, or consideration acceptable to the Seller, the Seller agrees to pay the Broker as commission a sum equal to 5 percent of the sum for which said property is sold or exchanged.... If the property is sold or exchanged, the commission is due and payable at the time of closing.... In the event of any transfer of an interest in said real estate within 365 days after the expiration of this Listing Contract and its extensions, to any person, firm or corporation who has been introduced, interested, or shown the property during the exclusive period of this listing by the Seller or by the Broker, his Representative, or by a Buyer-Broker, Seller agrees to pay a Broker the commission as provided by this Listing Contract ....*

*Appellant's Appendix* at 73 (emphasis supplied).

During the listing period, Cook entered into negotiations with and made a sales

presentation in Ann Arbor, Michigan, to John Bogdasarian. A sale did not result to Bogdasarian or to anyone else during the listing period. Thereafter, in the spring of 2005, Bogdasarian approached Mark Kramer, the manager and part-owner of Domus, with a proposal to buy the Domus real estate. The buyer was to be a new limited liability company formed under the name North Hill Street, L.L.C., and owned at least in part by Bogdasarian. After receiving the proposal from Bogdasarian, Mark Kramer contacted Paul Gjemre, the president of Coldwell Banker, to ask if Gjemre had any problem with the proposed transaction given the prior listing contact. Gjemre informed Kramer that he understood that the listing contract had expired and that Coldwell Banker had no claim to any commission arising from the sale of the real estate.

In April 2005, a sales contract was executed between Domus and Bogdasarian, on behalf of “North Hill St, LLC, an LLC to be formed”, for the sale of the Domus real estate. *Appellee’s Appendix* at 23. The closing, which was scheduled in the sales contract to occur by May 27, did not take place until July 28, 2005. The total purchase price at closing was \$5,100,000.00. Coldwell Banker did not receive any proceeds or commission from the sale.

On December 6, 2005, Cook filed suit against Mark and Thomas Kramer, Domus, and Coldwell Banker for commissions from the sale of the Domus real estate, as well as punitive damages for an unspecified independent tort.<sup>1</sup> Thereafter, on July 30, 2007, Coldwell Banker was dismissed from the lawsuit after it assigned to Cook any claim it may have to a real

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<sup>1</sup> The record reveals that the complaint was amended on at least two occasions, but Domus has provided us only with the initial complaint.

estate commission arising out of the sale of the Domus real estate to North Hill Street.

On November 27, 2007, Thomas Kramer filed a motion for summary judgment. Cook filed a cross-motion for partial summary judgment on September 4, 2008. Cook's motion was based solely upon his claim against Domus for a commission and did not include his claims against Mark and Thomas Kramer.<sup>2</sup> In October 2008, Domus filed a cross-motion for summary judgment against Cook. We note that none of these motions or accompanying designations of evidence are included in the record before us.

On January 27, 2009, following a hearing, the trial court entered an order granting Cook's motion for partial summary judgment against Domus and denying Thomas Kramer's and Domus's motions for summary judgment. The trial court entered a money judgment in favor of Cook and against Domus for a commission in the amount of \$255,000.00, along with prejudgment interest. Domus filed a motion to correct error, which the trial court denied on March 27, 2009. Upon Cook's motion, the trial court entered an order making the entry of summary judgment on the commission claim a final appealable judgment. Domus now appeals, arguing that summary judgment should have been granted in its favor rather than Cook's.

Initially, we observe that Domus has failed to provide us with a complete record. Specifically, it has not included in its appendix any of the summary judgment motions, memoranda, or designations of evidence, nor has it provided us with the amended complaint.

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<sup>2</sup> Cook's tort claims against the Kramers are not the subject of this appeal and remain pending before the trial court.

“It is the duty of an appellant to provide this court with a record sufficient to enable us to review the claim of error”. *Lenhardt Tool & Die Co., Inc. v. Lumpe*, 703 N.E.2d 1079, 1084 (Ind. Ct. App. 1998), *trans. denied*. While we prefer to decide cases on the merits, we have frequently affirmed or dismissed an appeal based upon the appellant’s failure to provide us with the necessary summary judgment material. *See, e.g., Yoquelet v. Marshall County*, 811 N.E.2d 826 (Ind. Ct. App. 2004); *Hughes v. King*, 808 N.E.2d 146 (Ind. Ct. App. 2004). *See also Finke v. Northern Ind. Pub. Serv. Co.*, 862 N.E.2d 266, 272-73 (Ind. Ct. App. 2006) (“[w]e cannot review a claim that a trial court erred in granting a motion for summary judgment when the appellant does not include in the record all the evidence designated to the trial court and before it when it made its decision”), *trans. denied*. Based upon the scant record before us, we conclude that Domus has not established that the trial court erred in granting summary judgment in Cook’s favor.

The purpose of summary judgment is to terminate litigation about which there can be no factual dispute and which may be determined as a matter of law. *Bushong v. Williamson*, 790 N.E.2d 467 (Ind. 2003). On appeal, our standard of review is the same as that of the trial court. Summary judgment is appropriate only where the evidence shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Olds v. Noel*, 857 N.E.2d 1041 (Ind. Ct. App. 2006). A party appealing from an order granting summary judgment has the burden of persuading us that the decision was erroneous. *Id.* In this case, the parties appear to agree that the commission claim is ripe for summary judgment, as the facts are undisputed and only questions of law remain.

Domus's three initial arguments for reversal are entirely without merit. First, Domus baldly asserts that because Coldwell Banker never made nor intended to make a claim against Domus for a commission from the sale, "the assignment from Coldwell Banker assigned nothing to Cook." *Appellant's Brief* at 10. This is, of course, not true. As an assignee, Cook acquired Coldwell Banker's rights to a commission under the listing contract to the extent Coldwell Banker would have been entitled to the commission had it pursued such a claim. *See Pettit v. Pettit*, 626 N.E.2d 444, 447 (Ind. 1993) ("the assignee stands in the shoes of the assignor").<sup>3</sup>

Domus next argues that Cook has no right to receive a commission because Coldwell Banker owns the listing contract and according to Cook's independent contractor realtor associate agreement with Coldwell Banker he earns a commission only when the transaction is completely closed and all amounts due and payable have been collected by Coldwell Banker. Domus reasons that because Coldwell Banker never collected a commission from the sale of the subject real estate, Cook is not entitled to a commission. This argument,

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<sup>3</sup> In its reply brief Domus asserts that the commission claim is subject to the affirmative defense of waiver based upon the statements made by Coldwell Banker, via Gjemre, to Mark Kramer prior to execution of the sales contract. "The law is well settled that grounds for error may only be framed in an appellant's initial brief and if addressed for the first time in the reply brief, they are waived." *Monroe Guar. Ins. Co. v. Magwerks Corp.*, 829 N.E.2d 968, 977 (Ind. 2005). Consequently, Domus has waived this issue. Waiver notwithstanding, we observe that Domus has not established the defense of waiver, which is "the intentional relinquishment of a known right involving both knowledge of the existence of the right and the intention to relinquish it." *Forty-One Assocs., LLC v. Bluefield Assocs., L.P.*, 809 N.E.2d 422, 428 (Ind. Ct. App. 2004). The evidence in the record simply establishes that at the time Kramer contacted Gjemre about the potential sale, Gjemre did not believe that Coldwell Banker had any right to a commission under the listing contract. In its brief argument on this matter, Domus does not explain how Gjemre's mistaken understanding can be equated with the intentional relinquishment of a known right.

however, entirely ignores the fact that Cook is proceeding under an assignment of rights from Coldwell Banker. Therefore, Cook's entitlement to commissions under his independent contractor agreement with Coldwell Banker is entirely irrelevant to the matter at hand.

Thirdly, Domus asserts that Cook is not a licensed real estate broker and cannot receive a commission for the sale of real estate except through a licensed broker. In its reply brief, Domus goes on to reason that Coldwell Banker could not assign its right to a commission under the listing contract to Cook because only a licensed broker can own a listing contract. Suffice it to say, the authorities cited by Domus do not in any way support Domus's position on appeal. *See, e.g., GDC Env'tl. Servs., Inc. v. Ransbottom Landfill*, 740 N.E.2d 1254, 1258 (Ind. Ct. App. 2000) ("in order to prevail on a claim for a commission, for performing the acts of a salesperson or broker, the claimant must allege and prove that, 'at the time the cause of action arose, the party seeking relief was not in violation of this section.'") (quoting Ind. Code Ann. § 25-34.1-6-2(b)). *See also First Fed. Sav. Bank of Ind. v. Galvin*, 616 N.E.2d 1048, 1051 (Ind. Ct. App. 1993) ("under I.C. 25-34.1-6-2, in order to prevail on a claim for a commission, the plaintiff must prove that he or she was a *licensed real estate salesperson or broker*") (emphasis supplied), *trans. denied*. Domus has wholly failed to establish that Coldwell Banker could not assign its rights under the listing contract to Cook.

The remaining question of law, and the one upon which this appeal really hinges, is whether Coldwell Banker (more precisely, Cook as assignee) earned a commission on the sale of the Domus real estate under the terms of the listing contract. Domus argues that no

commission was earned under the listing agreement's extension clause because the closing date (July 28, 2005) was more than 365 days after the listing contract expired (July 16, 2004). On the other hand, Cook argues that an interest was transferred when the contract of sale was executed, regardless of when the closing occurred. Because the contract of sale was executed within the extension period, Cook argues that the commission was earned at that time pursuant to the listing contract. The trial court agreed with Cook.

This case calls upon us to determine whether “any transfer of an interest” in the real estate occurred at the time the sales contract was executed. *Appellant's Appendix* at 73. It has long been held in Indiana that execution of a contract for the sale of real estate conveys (i.e., transfers) to the purchaser equitable title to the real estate. *See Knapp v. Ellyson Realty Co.*, 5 N.E.2d 973 (Ind. 1937). *See also Denham v. Degymas*, 147 N.E.2d 214 (Ind. 1958); *Area Plan Comm'n, Evansville-Vanderburgh County v. Hatfield*, 820 N.E.2d 696, 699 (Ind. Ct. App. 2005) (“[o]nce a contract for the sale of land is executed, even before a closing, equitable title vests with the prospective vendee”), *trans. denied; Kaghann's Korner, Inc. v. Brown & Sons Fuel Co., Inc.*, 706 N.E.2d 556 (Ind. Ct. App. 1999). In the instant case, it cannot be said that upon execution of the sales contract North Hill Street did not acquire an interest in the real estate in question. To be sure, Domus simply held the title as security for the purchase money until closing, and North Hill Street would have been entitled to specific performance upon full compliance by it under the contract. *See Knapp v. Ellyson Realty Co.*, 5 N.E.2d 973.

We agree with Cook that an “interest” in real property is broader than “title” to real



property and includes both judicially enforceable legal and equitable rights. *Cf. Denzinger v. Executive Bd. of Charlie B. Wells Mem'l*, 174 N.E.2d 588, 592 (Ind. Ct. App. 1961) (interpreting a probate statute and holding that the word interest “imports a property interest, a right or interest capable of measurement and of such definitude as to possess the substance for judicial enforcement”). Since North Hill Street acquired judicially enforceable rights when the sales contract was executed within 365 days of the expiration of the listing contract, Domus was obligated under the listing contract to pay a five-percent commission to Coldwell Banker at the time of closing.<sup>4</sup> Moreover, Domus cannot be allowed to defeat Coldwell Banker’s right to its commission on the sale simply by delaying the closing until after the extension period.

As assignee of Coldwell Banker’s rights under the listing contract, Cook is entitled to collect the commission directly from Domus. Thus, the trial court correctly granted partial summary judgment in Cook’s favor.

Judgment affirmed.

RILEY, J., concurs.

BAKER, C.J., concurs with separate opinion.

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<sup>4</sup> In other words, the commission was earned at the time the sales contract was executed, but it was not due and payable until the time of closing pursuant to the listing contract.

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**IN THE  
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DOMUS PROPERTIES, LLC, )

Appellant-Defendant, )

vs. )

JASON COOK, )

Appellee-Plaintiff. )

No. 71A03-0907-CV-296

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**BAKER, Chief Judge, concurring in result**

I agree with the majority’s resolution of this case. I write separately to address the waiver issue as addressed in the majority’s footnote 3. As the majority notes, waiver is “the intentional relinquishment of a known right involving both knowledge of the existence of the right and the intention to relinquish it.” Forty-One Assocs., LLC v. Bluefield Assocs., LP, 809 N.E.2d 422, 428 (Ind. Ct. App. 2004). Here, the undisputed facts establish that the president of Coldwell Banker disavowed—i.e., waived—Coldwell Banker’s right to this commission. As president, Gjemre was undeniably acting as an agent for Coldwell Banker. And I believe he could—and should—have been charged with constructive knowledge of the substance of this contract and that his disavowal should have bound Coldwell Banker.

Therefore, I believe that Coldwell Banker did, in fact, waive the right to this commission.

That said, I agree with the majority's conclusion that by raising the waiver issue for the first time in its reply brief, Domus has waived this argument. Therefore, I do not believe that our disposition of this case should turn on waiver.

And in any event, I believe that the paucity of Domus's appendix should, in effect, result in a procedural default. In the absence of motions, memoranda, or any designated evidence, it is nearly impossible for us to conduct an adequate review of this case. Therefore, I would also have concurred had the majority decided to dismiss the appeal based upon this procedural error. Inasmuch as the majority concluded that the best approach was to resolve the case on its merits, however, I agree with its decision to affirm.