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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2003-CA-001176-MR

JOHN LAWSON REALTY CO., INC.; MAC PROPERTIES, INC. — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN K. MERSHON, JUDGE
ACTION NO. 02-CI-006569

DON ERLER; RE/MAX COMMERCIAL BROKERS — APPELLEES

OPINION
AFFIRMING

** ** ** ** ** ** ** **

BEFORE: SCHRODER AND TACKETT, JUDGES; EMBERTON, SENIOR JUDGE.[1]

TACKETT, JUDGE: John Lawson Realty Co., Inc. and MAC Properties, Inc. bring this appeal from an order of the Jefferson Circuit Court granting summary judgment to Don Erler and Re/Max Commercial Brokers on their claim that they were entitled to compensation for their efforts in assisting the

[1] Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

appellants in a real estate transaction; from an order awarding Erler $13,675.00 for his efforts in the transaction; and from an order denying the appellants' motion to alter amend or vacate judgment. Because the circuit court correctly granted the appellees summary judgment on the issue of their entitlement to compensation for their participation in the real estate transaction, and because we find no error in the circuit court's assessment of proper compensation, we affirm.

Don Erler is a real estate agent in Jefferson County, Kentucky, and is the owner of Re/Max Commercial Brokers. Erler acted as Re/Max Commercial Brokers' agent in the events surrounding this case. Erler became aware of property for residential apartment housing owned by John Lawson Realty and MAC Properties located on Haney Way in Jefferson County. John Lawson is the president of John Lawson Realty and MAC Properties and acted as their agent in the transactions described herein. Erler also became aware that Chris Dischinger, a developer acting as agent for Equity Holdings Group, LLC, was interested in purchasing property in this zoning category. With the intention of facilitating the sale and purchase of the subject property, Erler introduced Lawson and Dischinger. Erler subsequently went out of town.

During his absence Erler received word from Dischinger that Lawson wanted to sign a contract on the Haney Way property

which would include a compensation provision for Erler. Erler told Dischinger to go ahead and sign the contract. A 90 day option contract, with an additional 60 day extension provision, was executed on February 27, 2002, entitling Dischinger to purchase the property for $425,000. Paragraph 4(e) of the contract included the provision “Sellers are to pay a finder’s fee to Don Erler, Re/Max Commercial Brokers per separate agreement.” The paragraph also contained a provision that John Lawson Realty was to receive a commission from MAC Properties per separate agreement. No separate written agreement between Lawson and Erler was ever executed.

Dischinger and Lawson did not consummate the original option contract by the termination date of the agreement. On August 1, 2002, Lawson and Dischinger executed an agreement voiding the February 27, 2002, agreement; however, on August 2, 2002, Dischinger and Lawson entered into a second agreement. The second agreement was reflected in two separate contracts. The first contract provided for the sale of the property owned by MAC Properties to be purchased by Dischinger for $185,000. The second contract provided for the purchase of the property owed by John Lawson Realty to be purchased by Dischinger for $240,000. The new contracts omitted any provision for a fee to be paid to Erler, though the MAC Properties contract retained a provision for payment of a commission by MAC Properties to John

Lawson Realty Co. The deposits from the original agreement were carried forward. This time the terms of the agreement were fulfilled, and the property was transferred to Dischinger's principal, Equity Holdings Group.

Erler sought payment for a commission or finder's fee on the transaction; however, he could not reach an agreement with Lawson. On August 30, 2002, Erler and Re/Max Commercial Brokers filed a complaint in Jefferson Circuit Court against John Lawson Realty Co. and MAC Properties seeking payment of a commission or finder's fee for their participation in the sale of the Haney Way property.

Each side moved for summary judgment. On January 9, 2003, the trial court entered an order granting Erler summary judgment on his claim for compensation for his participation in the sale of the Haney Way property. The decision reflected that statute of frauds issues had been satisfied, and stated that Erler was entitled to be compensated for his efforts pursuant to the doctrine of quantum meruit. On March 21, 2003, a bench trial was held on the issue of damages. On April 14, 2003, the trial court entered an order awarding Erler $13,675.00 as compensation for his participation in the sale. The trial court denied the appellants' motion to alter, amend or vacate. This appeal followed.

The appellants contend that Erler is not entitled to compensation for his participation in the sale of the Haney Way property because such compensation amounts to a real estate commission in the absence of a writing in contravention of Kentucky Revised Statutes (KRS) 371.010(8) and Louisville Trust Co. v. Monsky, Ky., 444 S.W.2d 120 (1969). KRS 371.010(8) provides as follows:

> No action shall be brought to charge any person:
>
> . . . .
>
> Upon any promise, agreement, or contract for any commission or compensation for the sale or lease of any real estate or for assisting another in the sale or lease of any real estate
>
> . . . .
>
> unless the promise, contract, agreement, representation, assurance, or ratification, or some memorandum or note thereof, be in writing and signed by the party to be charged therewith, or by his authorized agent.

"[KRS 371.010(8) is plain, positive, and unambiguous. It is controlling of [the] right to sue on a verbal contract. [There is] no such right." Monsky, supra, at 121. Moreover, a real estate agent may not recover in quantum meruit in the absence of a written contract. Id.

In Louisville Trust Co. v. Monsky, Thomas C. Bean was a licensed real-estate broker. Bean called Monsky and asked if

the latter was interested in selling his real estate consisting of a full block at Thirtieth and Chestnut Streets in Louisville. About a year later, Cabot Corporation signed a "real estate and purchase contract" addressed to Thomas C. Bean "as agent," in which Cabot agreed to purchase the property for $125,000. The contract included the provision that "Seller [Monsky] will pay any real estate commission payable." Monsky accepted this offer on June 23, 1965. Pursuant thereto, on July 8, 1965, Monsky deeded the property to Cabot. A dispute arose at this time in which Monsky contended he did not agree to pay Bean a commission, or that having once agreed to pay the commission, he later terminated that agreement. Bean took the position that he and Louisville Trust Company (which provided Bean office space) were entitled to a 5-percent commission.

Monsky held that Bean was not entitled to a commission for his participation in the sale because there was no writing as required by the statute of frauds provision contained in KRS 371.010(8). The decision also held that Bean was not entitled to recover on quantum meruit in the absence of a written contract or memorandum complying with the statute of frauds.

The present case is distinguishable from Monsky because the February 27, 2002, writing signed by Lawson as agent for the appellants was sufficient to comply with the statute of frauds. The whole purpose of the writing required by a Statute

of Frauds is to provide evidence of a contract. Shpilberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., Ky., 535 S.W.2d 227, 229 (1976). A memorandum signed by the party to be charged is sufficient if it relieves the court of the necessity of relying upon parol evidence to establish the existence of the contract. Koplin v. Faulkner, Ky., 293 S.W.2d 467, 470 (1956). KRS 371.010(8) requires only a memorandum or note of the agreement signed by the person to be charged. It follows that the agreement need not be a formal contract between the parties, but, rather, the writing need only establish the existence of the contract. See Restatement (Second) of Contracts § 131, § 133 (1981); Elizabethtown Lincoln-Mercury v. Tucker, Ky., 240 S.W.2d 847 (1951) (handwritten memorandum signed by president of company and on company stationary reciting in general way terms of employment satisfies statute of frauds).

Hence, unlike in Monsky the statute of frauds was complied with in this case because the February 27, 2002, option contract comprises a written note or memorandum supporting the existence of a contract between the appellants and Erler for the payment of a fee in connection with the Haney Way real estate transaction. It makes no difference that Erler was not a party to the agreement or that the contract was eventually voided.

While the general rule is that a broker cannot recover for the reasonable value of services rendered on a theory of

quantum meruit where an agreement to pay a broker's commission is unenforceable for want of a writing, where the statute of frauds is satisfied by a writing, a claim under a theory of quantum meruit/unjust enrichment will lie. Rader Company v. Stone, 178 Cal.App.3d 10, 27, 223 Cal.Rptr 806, 814 (1986).

Because the February 27, 2002, writing satisfied the statute of frauds, because Monsky is inapplicable, because there are otherwise no genuine issues of material fact, because it is undisputed the Erler expended efforts in organizing the Haney Way transactions, and because Erler is entitled to compensation for those efforts pursuant to the doctrine of quantum meruit, the trial court properly granted summary judgment to Erler on the issue of whether he was entitled to compensation.

In the alternative the appellants contend that the fee awarded by the trial court was excessive. The fee was determined by the trial court sitting without a jury. "In all actions tried upon the facts without a jury, the court shall find the facts specifically and state separately its conclusions of law thereon and render an appropriate judgment; . . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." CR 52.01.; Colston Investment Co. v. Home Supply Co., Ky. App., 74 S.W.3d 759, 764 (2001). Findings of fact are not clearly

erroneous if supported by substantial evidence. Janakakis-Kostun v. Janakakis, Ky. App., 6 S.W.3d 843, 852 (1999), cert. denied, 531 U.S. 811, 121 S.Ct. 32, 148 L.Ed.2d 13 (2000). The test for substantiality of evidence is whether when taken alone, or in the light of all the evidence, it has sufficient probative value to induce conviction in the minds of reasonable men. Kentucky State Racing Commission v. Fuller, Ky., 481 S.W.2d 298, 308 (1972).

At the March 21, 2003, bench trial each side called an expert witness to testify as to a reasonable fee. Erler called Barry Bohannon, who testified that he had been a commercial realtor for some 12 years and had participated in hundreds of transactions. Bohannon testified that in his expert opinion Erler was entitled to a fee of 3 1/2 percent of the $185,000 MAC Properties contract price, plus 6 percent of the $240,000 John Lawson Realty contract price, for a total fee of $20,875.[2]

Winston Wilson testified on behalf of the appellants. Wilson is a past president of the Kentucky Board of Realtors and has been a broker for over 20 years. Wilson testified that Erler was entitled to only a "finder's fee" or "referral fee,"

[2] The reason for the difference in the commission rates is that John Lawson Realty Co. was paid a 7 percent commission by MAC Properties and Erler assumed the position that he was entitled to a one-half share of that commission. There was no commission provision for the John Lawson Realty Co. transaction, and Erler asserted a claim to a full share of the standard 6 percent commission. It is unclear why a 7 percent commission, rather than the standard 6 percent commission, was associated with the MAC Properties transaction.

which is normally understood to mean 20 percent of the buyer's side of an agreement. Thus Wilson recommended a fee of $2,550.00, or 20 percent of 3 percent (one-half of 6 percent) of $425,000.00

"Quantum meruit" as an amount of recovery simply means "as much as deserved," and measures the recovery under an implied contract to pay compensation as the reasonable value of services rendered. Kintz v. Read 28 Wash.App. 731, 735, 626 P.2d 52, 55 (1981); Blacks Law Dictionary, (6th ed., 1990), p. 1243.

The circuit court established a fee of $13,675, representing 3 1/2 percent of $185,000 plus 3 percent of $240,000. This method uses standard commission rate principals in arriving at Erler's fee, and this valuation falls squarely within the range of values established by the expert witnesses. The court's figure clearly falls within the range of competent testimony. Underwood v. Underwood, Ky. App., 836 S.W.2d 439, 444 (1992), *overruled in part on other grounds by* Neidlinger v. Neidlinger, Ky. 52 S.W.3d 513 (2001). We conclude that the findings of fact made by the trial court in its establishment of a fee were not clearly erroneous, and that the method used in arriving at the valuation was not an abuse of discretion.

For the foregoing reasons the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Bruce Garrett Anderson
Louisville, Kentucky

BRIEF FOR APPELLEE:

Clifford H. Ashburner
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