

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000564-MR

N.E. TOUSSAINT & ASSOCIATES, LTD.
AND COMMERCIAL INDUSTRIAL
BROKERAGE REAL ESTATE

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE IRV MAZE, JUDGE
ACTION NO. 11-CI-001598

MCMAHAN GROUP, LLC;
COMMERCIAL KENTUCKY, INC.;
AND CRAIG COLLINS

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON, THOMPSON AND VANMETER, JUDGES.

THOMPSON, JUDGE: N.E. Toussaint & Associates, Ltd. (NET) and Commercial Industrial Brokerage Real Estate (Industrial Brokerage) appeal from a summary judgment of the Jefferson Circuit Court in favor of McMahan Group, LLC., Commercial Kentucky Inc., and its agent, Craig Collins, in this action to recover a

real estate commission after the seller's tenant exercised its right of first refusal.

We agree with the circuit court that NET and Industrial Brokerage are not entitled to a commission and affirm.

The material facts are undisputed. McMahan and Commercial Kentucky entered into a written brokerage contract pursuant to which Commercial Kentucky, through Collins, agreed to market and sell certain commercial property owned by McMahan. In exchange for its services, Commercial Kentucky was to receive 3% of the total sale price if sold directly by Commercial Kentucky and 5% of the total sale price if sold by Commercial Kentucky with a cooperating broker.

The property to be sold was leased by Fifth Third Bank. Pursuant to this lease, Fifth Third had the right of first refusal if McMahan received and was willing to accept an offer from a non-related third party to purchase the property. According to the lease terms, once a bona fide offer was received and accepted by McMahan, Fifth Third was entitled to "elect to purchase the [property] on the same terms and conditions as the third party offer."

After Commercial Kentucky, through Collins, advertised the property for sale on an internet website, the principal of Industrial Brokerage, Russell Lockner, contacted Collins to inquire about the property. After exchanges and discussions, Elliot Hayne, represented by NET, offered to purchase the property and submitted a letter of intent to McMahan setting forth preliminary terms and conditions of the purchase contract, including the payment of brokers' commissions to NET and Industrial Brokerage in the amount of 1.5% of the sale

price to each and a fee to Commercial Kentucky. The letter expressly stated it was acknowledged by Hayne and McMahan they did not intend it to be construed as a contract or be bound by its terms.

A formal purchase and sale agreement was executed by Hayne and McMahan pursuant to which Hayne agreed to pay \$3,200,000 for the property. McMahan agreed to pay a brokerage commission to NET, Industrial Brokerage, and Commercial Kentucky “only if the Closing occurs.” Closing was defined as “the delivery of the deed to Buyer, the delivery of other closing documents contemplated hereunder and the delivery of the Purchase Price to Seller.” The agreement further provided Fifth Third was entitled to a “fifteen (15) day right of first refusal to purchase the Property under the same terms and conditions contained herein.” That same section provided if Fifth Third exercised its right of first refusal, the terms and conditions contained in the offer would be deemed null and void and neither party would have any liability to the other.

Fifth Third initially declined to exercise its right of first refusal. However, after it was discovered the annual base rent for the property was erroneously quoted by Commercial Kentucky and Collins and by agreement, the purchase price was reduced to \$3,088,538. Because of the lower purchase price, McMahan extended another right of first refusal to Fifth Third. Fifth Third exercised the option and subsequently purchased the property using its broker, C.B. Richard Ellis.

NET and Industrial Brokerage filed this action to recover 1.5% of the sale price (\$46,320) as commission based on breach of express contract, breach of implied contract and quantum meruit. The circuit court granted summary judgment in favor of McMahan, Commercial Kentucky and Collins ruling the terms of purchase and sale agreement entitling NET and Industrial Brokerage to a commission were not satisfied. It further concluded because an express contract existed, they could not recover based on quantum meruit. This appeal followed.

The parties agree that pursuant to KRS 371.010(8), any agreement to pay a commission must be in writing. The question presented is whether NET and Industrial Brokerage are entitled to a commission pursuant to a valid contract written between the parties because they procured Hayne as a ready, willing and able purchaser. Although this factual situation appears to be novel in this Commonwealth's appellate courts and the parties invite us to adopt the holdings of foreign jurisdictions, we believe existing Kentucky law adequately addresses the issue.

The standard of review on appeal when a trial court grants a motion for summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996). Here, the parties agree there are no disputed material facts and, therefore, our concern is whether summary judgment was proper as a matter of law.

When interpreting a contract, there are fundamental rules of construction applicable including that “[a]ny contract or agreement must be construed as a whole, giving effect to all parts and every word in it if possible.” *City of Louisa v. Newland*, 705 S.W.2d 916, 919 (Ky. 1986). “Absent an ambiguity in the contract, the parties’ intentions must be discerned from the four corners of the instrument without resort to extrinsic evidence.” *Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.*, 94 S.W.3d 381, 385 (Ky.App. 2002). Generally, the interpretation of a contract, including determining whether a contract is ambiguous, is a question of law for the courts and subject to *de novo* review. *Id.*

NET and Industrial Brokerage rely on the letter of intent as establishing a written contract for the payment of their commission. However, the letter expressly states it was not a binding contract and a contract would not exist until a formal purchase agreement was executed. We conclude that by its express terms, the letter of intent merely summarized the acceptable terms of a future purchase and sale agreement. Consequently, the only contract binding the parties was the purchase and sale agreement.

The purchase and sale agreement expressly provides NET and Industrial Brokerage are entitled a commission for the sale of the property only if certain conditions are met. First, Fifth Third had to decline to exercise its right of first refusal. However, it did exercise that right. Moreover, it states the brokerage commissions were due “if and only if the Closing occurs.” Importantly, closing is defined as “the delivery of the deed to Buyer, the delivery of the other closing

documents, and the delivery of the purchase price to Seller.” The term “Buyer” is specifically defined as Elliot A. Hayne. Under the express terms of the purchase and sale agreement, NET and Industrial Brokerage’s receipt of a commission was conditioned on the occurrence of the closing between McMahan and Hayne.

Because the closing did not occur, they are not entitled to a commission pursuant to the terms of the purchase and sale agreement.

The trial court found NET and Industrial Brokerage could not recover on a theory of an implied contract because under the terms of the purchase and sale agreement, they were not entitled to a commission. We agree. Where there is an express contract, the terms of the contract control and, therefore, recovery is not available based on quantum meruit. *Bates v. Starkey*, 212 Ky. 347, 279 S.W. 348, 350 (1926). Here, there was a written contract but under its terms NET and Industrial Brokerage are not entitled to a commission.

For similar reasons, NET and Industrial Brokerage cannot recover under the theory that they were the procuring cause of the sale. The doctrine of procuring cause provides that a “real estate broker is entitled to a commission where he has been the procuring cause of sale, even though the owner enters into negotiations with the person so procured and consummates the sale.” *Mayo v. Century 21 Action Realtors, Inc.*, 823 S.W.2d 466, 468 (Ky.App. 1992). Again, the express terms of the purchase and sale agreement prevail and preclude any recovery based on a procuring cause theory. Moreover, although NET and Industrial Brokerage may have been the procuring cause of the purchase and sale agreement between

Hayne and McMahan, they were not the procuring cause of the sale of the property to Fifth Third. While Hayne's offer may have triggered Fifth Third's right of first refusal, NET and Industrial Brokerage did not procure Fifth Third as a buyer. Fifth Third purchased the property pursuant to its lease agreement with McMahan, not because it was procured as a buyer by NET and Industrial Brokerage.

Based on the foregoing, the summary judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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