NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2012 CA 1684

TEC REALTORS, INC. D/B/A COLDWELL BANKER TEC REALTORS

VERSUS

PAGLIA HOLDINGS, L.L.C., DAVID M. PAGLIARULO AND STEPHANIE H. PAGLIARULO

Judgment Rendered: April 26, 2013

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Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Docket Number 2007-16283

The Honorable Richard A. Swartz, Judge Presiding

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BEFORE: WHIPPLE, C.J., McCLENDON, AND HIGGINBOTHAM, J.J.

McClendon, J. concurs.

WHIPPLE, C.J.

This matter is before us on appeal by plaintiff, TEC Realtors, Inc. D/B/A Coldwell Banker TEC Realtors ("TEC"), from a judgment of the trial court finding no breach of the listing agreement by the defendants, Paglia Holdings, L.L.C., David M. Pagliarulo, and Stephanie H. Pagliarulo, and thereby dismissing TEC's petition with prejudice. The judgment also dismissed defendants' reconventional demand against TEC with prejudice.

For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

David Pagliarulo and his wife, Stephanie Pagliarulo, signed a listing agreement with TEC for the sale of property located at 1159 Hardy Drive in Covington, Louisiana.[1] The agreement was accepted by Gena Hines, a real estate agent with TEC.[2] As set forth in the listing agreement, the effective date of the listing was September 28, 2006, the expiration date of the listing term was March 28, 2007, and the listed price of the property was $699,500.00.

In late November of 2006, Darlene Delesdernier, an associate real estate agent at TEC, began to assist Ms. Hines with the strategic advertising and marketing of the property. Ms. Delesdernier went out to see the property and met with Mr. Pagliarulo and Ms. Hines after Thanksgiving in 2006. Ms. Delesdernier then asked Mr. Pagliarulo to extend the listing agreement and to reduce the price of the property. Mr. Pagliarulo agreed to reduce the price to $648,000.00 and a "Price Change on Listing" form was executed by TEC Broker Martha Mears on December 28, 2006, reflecting the reduced price. Via an email response to Ms.

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[1]Although David and Stephanie Pagliarulo signed the listing agreement as the "owners" of the property, Mr. Pagliarulo testified that the property was actually owned by Paglia Holdings, L.L.C., a corporation formed by Mr. Pagliarulo and his wife for the purpose of holding real estate in Louisiana.

[2]Gena Hines is also Stephanie Pagliarulo's aunt.

Delesdernier dated December 18, 2006, Mr. Pagliarulo also agreed to extend the listing agreement through the end of June 2007. The parties, however, never executed a "Listing Agreement Extension Form" or any other document extending the listing agreement in writing.

At the end of March, when the property had not sold before the expiration date stated in the listing agreement, the Pagliarulos had a discussion with their agent, Ms. Hines, wherein Ms. Hines advised them that TEC would not agree to re-list the property if the Pagliarulos did not agree to another reduction of the listing price. The Pagliarulos refused to agree to a further reduction of the listing price. Mr. Pagliarulo told Ms. Hines that he and Mrs. Pagliarulo felt they "were where we needed to be" with the price, to which Ms. Hines responded that TEC would not be re-listing the property. At that point, Mr. Pagliarulo asked Ms. Hines if they were done, and Ms. Hines replied, "I guess so."

On April 25, 2007, the Pagliarulos accepted an offer to purchase the property from Beth Hamaker Hart and her husband, Richard Hart.[3] Thereafter, on May 25, 2007, a meeting was held where the Pagliarulos, Martha Mears, Darlene Delesdernier, and Beth Hart were present to clear up some confusion as to whether TEC was still listing the property. Ms. Delesdernier was under the impression that the listing agreement with TEC had been extended through the end of June 2007 based on Mr. Pagliarulo's December email, while the Pagliarulos were of the impression that the listing agreement expired on March 28, 2007, as stated in the agreement.[4] Mr. Pagliarulo told Ms. Mears that he had

[3]Mr. Pagliarulo testified that prior to entering into the listing agreement with TEC, they had received an offer on the property from the Harts in the summer of 2006. Beth Hart is a real estate agent and she and her husband live about one block from the Hardy Drive property at issue herein.

[4]Unbeknownst to the Pagliarulos, on April 13, 2007, Ms. Mears signed and dated a printed copy of Mr. Pagliarulo's December 18, 2006 email, which she testified signified her acceptance of the "extension" and served as the date the listing was extended.

met with his agent at the end of the listing period, and that after he and Mrs. Pagliarulo refused to reduce the price, Ms. Hines told him that he was free to sell the property on his own once the listing agreement expired. At the conclusion of the meeting, Ms. Mears advised the Pagliarulos that they were free to go ahead with the sale to the Harts and asked the Pagliarulos to sign a "Cancellation of Listing Agreement" form in order for TEC to remove the property from the MLS.[5] As such, by Act of Cash Sale dated May 29, 2007, the Pagliarulos sold the home to the Harts for $625,000.00.

On November 19, 2007, TEC filed a petition against the Pagliarulos and Paglia Holdings, L.L.C. seeking damages in the amount of $27,000.00 with legal interest and costs, contending that at the time of the sale to the Harts, the listing agreement with TEC was still in effect, and that TEC was thereby entitled to the agreed-upon commission as set forth in the listing agreement.

The Pagliarulos answered TEC's petition, setting forth affirmative defenses, and filed a reconventional demand against TEC. In their answer, the Pagliarulos contended that TEC failed to allege the existence of any legally cognizable and enforceable agreement with the property owner, Paglia Holdings, L.L.C., by which TEC could pursue a claim or cause of action arising in contract. Further, the Pagliarulos contended, to the extent that any are claimed, TEC's claims *ex contractu* against Paglia Holdings, L.L.C. and David and Stephanie Pagliarulo are barred by TEC's own breaches and/or non-performance. The Pagliarulos further alleged in their reconventional demand that they are entitled to damages from TEC for detrimental reliance, breach of contract, and abuse of process.

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[5]The "MLS" is an internet Multiple Listing Service through which brokers submit listings of available properties to other brokers and agents.

The matter was heard by the trial court on February 29, 2012. On March 21, 2012, the trial court issued written reasons for judgment, finding no breach of TEC's listing agreement by the Pagliarulos, and further finding that the Pagliarulos failed to prove the claims made in their reconventional demand against TEC. As such, by judgment dated April 9, 2012, the trial court dismissed TEC's petition with prejudice, dismissed the Pagliarulos' reconventional demand against TEC with prejudice, and ordered that each party bear their own costs.

TEC appeals, contending the trial court erred: (1) in finding that there was no extension of the listing agreement; (2) in finding that TEC did not "quote" the property to the Harts during the term of the listing agreement; and (3) in not awarding TEC attorney fees and costs.

DISCUSSION

Assignment of Error Number One

In its first assignment of error, TEC contends that the trial court erred in finding that there was no extension of the listing agreement. TEC contends that Mr. Pagliarulo's December 18, 2006 email response to Ms. Delesdernier stating that he is "willing to commit to extending the listing period thru the end of June 2007 ...." is sufficient, in and of itself, to extend the terms of the formal listing agreement executed by the parties herein. Moreover, although TEC has a formal Listing Agreement Extension document, TEC contends it was not necessary that the parties execute the document to nonetheless confect their contract.

The Pagliarulos counter that there was absolutely no "meeting of the minds" as to establish consent to extend the contract period. The Pagliarulos contend that the evidence establishes that TEC did not even attempt to show that Ms. Mears "accepted" or approved of the alleged extension until well after Ms. Hines had communicated to Mr. Pagliarulo that TEC would no longer be willing to list the property, and that the listing agreement had expired under its own terms.

A contract is an agreement by two or more parties whereby obligations are created, modified, or extinguished. LSA-C.C. art. 1906. Where there is no "meeting of the minds" between the parties, there is no consent and, thus, no enforceable contract. See LSA-C.C. art. 1927; Howell v. Rhoades, 547 So. 2d 1087, 1089 (La. App. 1st Cir. 1989) (where the parties discussed terms of architectural fee, and yet no written contract was ever drafted, there was "no meeting of the minds" between plaintiff and defendant when subsequent confusion arose over whether such fee was contingent).

Mr. Pagliarulo testified that the last he heard about an extension of the listing agreement was the December email. He stated that he "assumed and expected" that, at some point prior to the expiration of the listing agreement, he and Stephanie would be called into the office to sign an extension if that was TEC's intent, because he was being called in to TEC's office to sign different documents, whether it be a price reduction or type of disclosure, on a weekly basis to "dot the I's and cross the T's." Thus, he assumed that during the normal course of business, he and Mrs. Pagliarulo would have been required to sign an extension agreement or other formal paperwork stating same to TEC, intended to extend the listing, and he testified that never happened. Mr. Pagliarulo further testified that Ms. Mears had told him she felt that it was "done sloppily." Mr. Pagliarulo testified that after Ms. Hines told him that TEC was not going to re-list the property at the expiration of the listing term on March 28, 2007, he ultimately procured a buyer for the property on his own. Mr. Pagliarulo testified that with regard to his dealings with TEC, he understood that, not only was it necessary that he and his wife agree to reduce the price in order for TEC to re-list the property, but that it was a "deal breaker" if they would not reduce the price.

Ms. Hines testified that she believed that the listing had expired, and that she did not speak to Mr. Pagliarulo about extending the listing. Ms. Hines further

testified that if there were any agreements made between the Pagliarulos and Ms. Delesdernier to extend that listing, she was not aware of it.

In its written reasons for judgment, the trial court found that, "[b]ased on the evidence presented, … the email from Mr. Pagliarulo expressed a willingness to extend the Listing Agreement, but no document was ever signed by the parties that extended the Listing Agreement." The trial court further noted that "[o]n April 13, 2007, after the listing agreement expired, Ms. Mears signed and dated a copy of Mr. Pagliarulo's December 18, 2006 e-mail." Given these findings, the trial court held:

> [T]here was no meeting of the minds, the Pagliarulos did not intend or understand that the email sent on December 18, 2006 would constitute a valid extension of the Listing Agreement, and that the primary term of the Listing Agreement expired on March 28, 2007.

After careful consideration of the record, we agree. In the matter before us, it is evident that while Ms. Delesdernier and Mr. Pagliarulo discussed extending the listing agreement, no written agreement was ever drafted as was expected by Mr. Pagliarulo if the parties, including the co-owner of the property, Mrs. Pagliarulo, were to ever agree to an actual extension of the listing agreement. Moreover, Mr. Pagliarulo justifiably and reasonably relied on the representations made by his agent, Ms. Hines, i.e., that the listing agreement would expire by its stated terms when the Pagliarulos refused TEC's request to further reduce the listed price of the property. Thus, considering the evidence and testimony presented herein, we find no error in the trial court's finding that there was no "meeting of the minds" that would establish that Mr. Pagliarulo's December 2006 email, expressing a **willingness** to extend the listing agreement between the parties, and purportedly accepted by TEC in April 2007, served as a valid extension of the listing agreement herein. Cf. Ricky's Diesel Service, Inc. v. Pinell, 2004-0202 (La. App. 1st Cir. 2/11/05), 906 So. 2d 536.

Assignment of Error Number Two

In its second assignment of error, TEC contends that the trial court erred in finding that TEC did not "quote" the property to the Harts during the term of the listing agreement so as to trigger application of the extension clause contained in the listing agreement.[6]

Generally, a real estate broker is entitled to a commission if it has been a "procuring cause" of the transaction. See Creely v. Leisure Living Inc., 437 So. 2d 816, 820 (La. 1983). This general principle has been recognized even where the term of the broker's listing agreement has expired. TEC Realtors, Inc. v. D & L Fairway Property Management, L.L.C., 2009-2145 (La. App. 1st Cir. 7/9/10), 42 So. 3d 1116, 1122, writ denied, 2010-1841 (La. 10/29/10), 48 So. 3d 1092.

Our jurisprudence has defined "procuring cause" as a cause originating or setting in motion a series of events which, without break in their continuity, result in the accomplishment of the prime object of the employment of the broker, which may variously be a sale or exchange of the principal's property, an ultimate agreement between the principal and a prospective contracting party, or the procurement of a purchaser who is ready, willing and able to buy on the principal's terms. TEC Realtors, Inc. v. D & L Fairway Property Management, L.L.C., 42 So. 3d at 1122-1123, (citing Creely v. Leisure Living Inc., 437 So. 2d at 820-821.). Thus, in order to establish that his efforts were the procuring cause of a sale, a broker must show more than the mere fact that his actions in some way aided the sale. TEC Realtors, Inc. v. D & L Fairway Property Management, L.L.C., 42 So. 3d at 1123.

The pertinent language in the instant listing agreement provides as follows:

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[6]Although the term "quoted" is not defined in the listing agreement herein, "quoted," as used in a listing agreement extension clause, has been defined in the jurisprudence to mean "at least that the price be stated." Coppage v. Camelo, 330 So. 2d 695, 696 (La. App. 4th Cir. 1976).

> Owner agrees to pay Broker's commission of 6% - $100,000, 4% - add. price on the gross amount of any agreement to sell, exchange, or option that may be negotiated during the existence of the agreement, **or on the gross amount of any such agreement made within 180 days after the expiration or termination of this agreement, with anyone to whom said property has been quoted during the term of this agreement,** part of which commission may be paid to a cooperating Broker at listing Broker's sole discretion.

(Emphasis added.)

To interpret the above provision, we look to the following precepts. Generally, legal agreements have the effect of law upon the parties, and, as they bind themselves, they shall be held to a full performance of the obligations flowing therefrom. TEC Realtors, Inc. v. D & L Fairway Property Management, L.L.C., 42 So. 3d at 1124. The interpretation of a contract is the determination of the common intent of the parties. LSA-C.C. art. 2045. When the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent. LSA-C.C. art. 2046. The words of a contract must be given their generally prevailing meaning. LSA-C.C. art. 2047. A provision susceptible of different meanings must be interpreted with a meaning that renders it effective and not with one that renders it ineffective. LSA-C.C. art. 2049. Each provision in a contract must be interpreted in light of the other provisions so that each is given the meaning suggested by the contract as a whole. LSA-C.C. art. 2050. A doubtful provision must be interpreted in light of the nature of the contract, equity, usages, and the conduct of the parties before and after the formation of the contract. LSA-C.C. art. 2053.

According to the extension clause at issue herein, TEC was entitled to a commission on the gross amount of any agreement to sell the property made within 180 days after the expiration or termination of the listing agreement, with anyone to whom the property had been quoted during the term of the listing agreement.

In support of TEC's argument that it quoted the property to the Harts during the term of the listing agreement herein, TEC contends that it "offered the [p]roperty for sale by putting a sign in front of it and by including it in the Multiple Listing Service." TEC contends that because Mrs. Hart was a realtor, she was "obviously" familiar with the MLS, because she used it to obtain the information necessary to access the lockbox code. TEC further argues that because Mrs. Hart used her lockbox key to access the property on November 15, 2006, which was during the term of the listing agreement, Mrs. Hart was "quoted" and TEC thereby earned its commission.

The Pagliarulos countered that at all relevant times, Mrs. Hart was aware of the Hardy Drive property. Mr. Pagliarulo testified that in the summer of 2006, before they entered into the listing agreement with TEC on September 28, 2006, the Harts had approached him about the home and had made an offer to buy the property. Mr. Pagliarulo further testified that the Harts lived about one block down the street from the property. He testified that had TEC brought him a buyer, he would have gladly paid the full commission even after the listing agreement expired, but TEC did not bring the Harts to him.

On review, we first note that TEC failed to set forth any evidence that the Pagliarulos were aware that Mrs. Hart entered the home via her lockbox key. In fact, Ms. Delesdernier testified that she did not know if Mr. Pagliarulo was with Mrs. Hart when she entered the home, stating that if Mr. Pagliarulo were with Mrs. Hart, he would probably have used his own key and not used the lockbox at all. TEC further failed to establish that the Harts had been "quoted" the property during the term of the listing agreement.

In order to establish that his efforts were the procuring cause of a sale, a broker must show more than the mere fact that his actions in some way aided the sale. TEC Realtors, Inc. v. D & L Fairway Property Management, L.L.C., 42 So.

3d at 1123. In the instant case, even if we were to say that Mrs. Hart's use of the lockbox aided the sale, this mere fact alone does not establish that TEC was the procuring cause of the sale, particularly when the Harts lived a block away from the property and had made the Pagliarulos an offer before they listed the property with TEC.

In ruling on this issue, trial court noted the following in its written reasons for judgment:

> TEC claims that by putting a sign in front of the property, and by including the property, its price, and the lockbox code in the Multiple Listing Service it satisfied the "quoting" requirements of the extension clause. Mr. Pagliarulo testified that the Harts had visited the property prior to the listing with TEC. In addition, Elizabeth Hart, a licensed real estate agent and a neighbor, used her lock box key to view the property on November 15, 2006, April 5, 2007, April 6, 2007, April 13, 2007 and April 17, 2007. There was no evidence of any direct contact between the Harts and TEC.
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> Based on the foregoing, the Court finds the property was not "quoted" to the purchasers during the term of the agreement. The Court further finds that there is no minimal causal connection between the activities of TEC and the ultimate decision by the Harts to purchase the property. Accordingly, TEC is not entitled to the commission under the extension clause.

On review of the law and evidence herein, we find no error in the trial court's ruling that TEC failed to establish that the property was "quoted" to the Harts by TEC during the existence of the listing agreement, or in its ruling that TEC failed to establish that it was the procuring cause of the Pagliarulos' sale to the Harts.

Assignment of Error Number Three

In its final assignment of error, TEC contends that the trial court erred in not awarding it costs and attorney's fees under the terms of the listing agreement, which provide: "In case of employment of counsel to enforce this agreement, Owner will pay all costs and reasonable attorney's fees incurred by Broker."

As set forth above, Mr. Pagliarulo testified that Ms. Hines told him at their meeting at the end of March 2007 that they were free to sell the property on their own. Moreover, at the conclusion of the May 25, 2007 meeting with Martha Mears, Darlene Delesdernier, and Beth Hart, Ms. Mears told the Pagliarulos that they were "free to go ahead with [their] sale" to the Harts. Given the instructions from representatives of TEC, the Pagliarulos executed the sale with the Harts without any indication from TEC that it intended to "enforce" the agreement such as to incur costs and attorney's fees. Accordingly, we likewise find no basis to award same.

Given our affirmance of the trial court's finding that the listing agreement herein had expired and that the extension clause was not triggered so as to apply to the Pagliarulos' sale of the property to the Harts, we likewise find no merit to this assignment of error.

CONCLUSION

For the above and foregoing reasons, the April 9, 2012 judgment of the trial court is affirmed. Costs of this appeal are assessed to the appellant, TEC Realtors, Inc. D/B/A Coldwell Banker TEC Realtors.

AFFIRMED.