NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2013 CA 1327

KENNETH E. DUTRUCH

VERSUS

SOUTHEASTERN LOUISIANA WATER AND SEWER CO., LLC AND JARED RIECKE

Judgment Rendered: JUL 03 2014

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Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Suit Number 2010-11212

Honorable William J. Knight, Presiding

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* * * * * *

BEFORE: PARRO, GUIDRY, AND DRAKE, JJ.

GUIDRY, J.

Plaintiff, Kenneth Dutruch, appeals from a trial court judgment granting summary judgment in favor of defendants, Southeastern Louisiana Water and Sewer Co., LLC (SELA) and JARED Riecke, and dismissing his claims with prejudice. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

Dutruch is a licensed electrical engineer and owner of Professional Engineering Consultants Corporation (PEC), which provides engineering and consulting services. On November 15, 2004, Dutruch and SELA entered into an exclusive agency agreement, authorizing Dutruch, along with Bruce Cucchiara and Gerald Gilbert (directors of SELA), to act as exclusive agents of SELA to secure a sale for SELA. The agreement provided that if a commitment to purchase was obtained by the exclusive agents or by SELA from any source that the agents introduced, SELA agreed to pay the agents a fee of 5% on the total amount of the sale price. The agreement further provided that the fee was earned on the securing of a commitment to purchase and payable upon the execution of the documents consummating the sale. Finally, the parties agreed to honor the guarantees in the agreement for three years from the date of the agreement.

After signing the agreement, Dutruch performed preliminary work on attracting a buyer for SELA. Ultimately, Dutruch recommended that a public entity, such as St. Tammany Parish Government, would be the most advantageous buyer for SELA. The exclusive agents subsequently initiated conversations with the Parish regarding the purchase of SELA.

In December 2006, Jared Riecke, CEO of SELA, met with Parish officials regarding the proposed sale of SELA to the Parish. Thereafter, SELA renegotiated its agreement with the exclusive agents, adjusting the terms of their fee. Specifically, a January 31, 2007 agreement provided that, should a commitment to

purchase be obtained by the exclusive agents or by SELA from any source the agents introduced, SELA agreed to pay a fee referred to as a finder's fee. The agreement provided that the finder's fee shall be either a flat rate finder's fee or a percentage rate finder's fee. The type of fee payable depended upon the net cash paid to SELA and was determined according to a schedule contained in the agreement. Additionally, the agreement provided:

> And further, the November 15, 2004 [agreement] shall be supplemented and ... considering the many nuances associated with the sale of a business, SELA shall not be required to accept any purchase price and therefore, shall not be liable to [the exclusive agents] for a Finder's Fee unless and until, SELA, in its sole discretion, accepts the terms of a purchase agreement with a potential buyer. If, for any reason, SELA decides not to execute a purchase agreement or refuses to close on the sale of the company, SELA shall not be obligated to [the exclusive agents] for any Finder's Fee or any amount whatsoever.

Finally, the agreement provided that the remainder of the November 15, 2004 agreement remained unchanged and was given full force and effect as of the date of its execution.

On May 17, 2007, the Parish presented an offer to Riecke to purchase SELA for $39,000,000. On May 23, 2007, Riecke rejected the Parish's offer and proposed a counteroffer for $54,000,000. However, the Parish rejected Riecke's counteroffer on October 25, 2007, and again offered $39,000,000 for the purchase of SELA. Thereafter, Riecke informed Dutruch, Cucchiara, and Gilbert in an October 29, 2007 email that SELA was going to reject the Parish's offer and was not going to prepare a counteroffer, because SELA felt that the Parish was not dealing in good faith. Riecke also noted that the exclusive agency agreement was about to expire, and that there were no more potential buyers forthcoming. On November 5, 2007, Riecke formally rejected the Parish's offer.

In January 2010, the Parish and SELA finally agreed on a purchase price of $36,000,000 for SELA's assets. Thereafter, counsel for Dutruch notified SELA

that Dutruch's fee had been earned and was due at closing and requested confirmation that SELA would protect Dutruch's interest in the proceeds of the sale. However, SELA responded, advising that it disputed any claim by Dutruch to a fee pursuant to the November 15, 2004 agreement and/or the supplemental January 31, 2007 agreement.

On February 23, 2010, Dutruch filed a petition for breach of contract and for damages, naming SELA and Riecke as defendants. Dutruch asserted that SELA's conduct was a repudiation and an anticipatory breach of the agreement between the parties and the amendment thereto. Following the consummation of the sale between the Parish and SELA in March 2010, Dutruch amended his petition to assert that the terms and conditions of the agreements are enforceable and binding against SELA, and that Dutruch is entitled to damages for breach of the agreements under applicable law.

Thereafter, Riecke and SELA filed a motion for summary judgment, asserting that Dutruch could not establish that he performed his obligations within the three-year term of the agreements. Particularly, they asserted that Dutruch could not establish any acceptance of an offer by Riecke or execution of a purchase agreement between November 15, 2004 and November 15, 2007, nor could he show that Riecke closed on any sale of SELA or SELA's assets during that same time.

Following a hearing on the motion, the trial court granted summary judgment in favor of Riecke and SELA and dismissed Dutruch's claims against them with prejudice. Dutruch now appeals from the trial court's judgment.

STANDARD OF REVIEW

A motion for summary judgment is a procedural device used to avoid a full scale trial when there is no genuine issue of material fact. Johnson v. Evan Hall Sugar Cooperative, Inc., 01-2956, p. 3 (La. App. 1st Cir. 12/30/02), 836 So. 2d

484, 486. A motion for summary judgment is properly granted if the pleadings, depositions, answers to interrogatories, and admissions, together with affidavits, if any, admitted for purposes of the motion for summary judgment, show that there is no genuine issue of material fact, and that mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B)(2).

On a motion for summary judgment, the burden of proof is on the mover. If, however, the mover will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the mover's burden on the motion does not require that all essential elements of the adverse party's claim, action, or defense be negated. Instead, the mover must point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, the adverse party must produce factual evidence sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial. If the adverse party fails to meet this burden, there is no genuine issue of material fact, and the mover is entitled to summary judgment. La. C.C.P. art. 966(C)(2).

In determining whether summary judgment is appropriate, appellate courts review evidence *de novo* under the same criteria that govern the trial court's determination of whether summary judgment is appropriate. Lieux v. Mitchell, 06-0382, p. 9 (La. App. 1st Cir. 12/28/06), 951 So. 2d 307, 314, writ denied, 07-0905 (La. 6/15/07), 958 So. 2d 1199. Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material can be seen only in light of the substantive law applicable to the case. Smith v. Kopynec, 12-1472, p. 4 (La. App. 1st Cir. 6/7/13), 119 So. 3d 835, 837. Interpretation of a contract is usually a legal question which can be properly resolved in the framework of a motion for summary judgment. Sanders v. Ashland Oil, Inc., 96-

1751, p. 7 (La. App. 1st Cir. 6/20/97), 696 So. 2d 1031, 1036, writ denied, 97-1911 (La. 10/31/97), 703 So. 2d 29.

DISCUSSION

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. Belle Pass Terminal, Inc. v. Jolin, Inc., 92-1544, 92-1545, p. 16 (La. App. 1st Cir. 3/11/94), 634 So. 2d 466, 479, writ denied, 94-0906 (La. 6/17/94), 638 So. 2d 1094. In other words, a contract between the parties is the law between them, and the courts are obligated to give legal effect to such contracts according to the true intent of the parties. La. C.C. art. 2045; Sanders, 96-1751 at p. 7, 696 So. 2d at 1036.

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. La. C.C. art. 2046. The rules of interpretation establish that, when a clause in a contract is clear and unambiguous, the letter of that clause should not be disregarded under the pretext of pursuing its spirit. La. C.C. art. 2046, comment (b); Boh Bros. Construction Co., LLC v. State ex rel. Department of Transportation and Development, 08-1793, p. 4 (La. App. 1st Cir. 3/27/09), 9 So. 3d 982, 984 85, writ denied, 09-0856 (La. 6/5/09), 9 So. 3d 870.

To determine the meaning of words used in a contract, a court should give them their generally prevailing meaning. La. C.C. art. 2047. If a word is susceptible of different meanings, it must be interpreted as having the meaning that best conforms to the object of the contract. La. C.C. art. 2048. A provision susceptible of different meanings must be interpreted with a meaning that renders it effective and not with one that renders it ineffective. La. C.C. art. 2049. Furthermore, every 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. La. C.C. art. 2050.

In the instant case, the parties entered into an agreement on November 15, 2004, which provided, in part:

> You are hereby authorized to act as our exclusive agent to secure a sale for [SELA]. Should a commitment to purchase be obtained by you or by us from any source you introduce, SELA agrees to pay your fee on the total amount of the sale price. For these services, you are to be paid five (5) percent on the total amount of the sale price.
>
> * * *
>
> It is agreed and understood that ... your fee is to be paid on the total amount of the sale price, is earned on the securing of a commitment to purchase and payable upon the execution of the documents consummating the sale.
> ...Both parties will honor these guarantees for three years from the date of this letter of agreement.

By letter dated January 31, 2007, the November 15, 2004 agreement was amended to provide, in pertinent part:

> Should a commitment to purchase be obtained by you or by us from any source you introduce, SELA agrees to pay a fee to be further referred to as a Finder's Fee. The Finder's Fee shall be either a (1) Flat Rate Finder's Fee or (2) a Percentage Rate Finder's Fee, but in no way shall both be paid as a Finder's Fee. ...
>
> (1) The Flat Rate Finder's Fee shall be as indicated with Schedule 1.1 based upon the Net Cash Paid to Seller enumerated within the Settlement Statement to be provided by closing attorney.
>
> (2) The Percentage Rate Finder's Fee shall be as indicated in Schedule 1.1 and determined pursuant to the Net Cash Paid to Seller referenced above. ...
>
> Considering the Net Cash paid to Seller referenced herein, the applicable Flat Rate or Percentage Rate shall be as provided herein Schedule 1.1.
>
> * * *
>
> And further, the November 15, 2004 letter shall be supplemented and include the provision that the range of purchase prices enumerated herein shall not be a representation that SELA agrees or consents to any purchase price enumerated herein. Further, considering the many nuances associated with the sale of a business, SELA shall not be required to accept any purchase price and therefore, shall not be liable to you for a Finder's Fee unless and until, SELA, in its sole discretion, accepts the terms of a purchase agreement with a potential buyer. If, for any reason, SELA decides not to execute a purchase agreement or refuses to close on the sale of

> the company, SELA shall not be obligated to you for any Finder's Fee or any amount whatsoever.
>
> The remainder of the November 15, 2004 [agreement] remains unchanged and is given the full force and effect as of the date of its execution.

Reading the above agreements together, it is evident that the parties intended to be bound by the terms of the agreement for a period of three years from November 15, 2004. The three-year period for honoring their respective guarantees was first articulated in the original November 15, 2004 agreement and was unchanged and given full force and effect in the January 31, 2007 agreement. Therefore, we must now examine the agreements to determine if Dutruch met his obligations under the terms of the agreement so as to trigger the liability of SELA to pay his finder's fee within the three-year period.

According to the language of both agreements, SELA agrees to pay Dutruch a fee should he obtain a commitment to purchase SELA. The November 15, 2004 agreement further states that the fee is earned on the securing of a commitment to purchase and is payable upon the execution of documents consummating the sale. Neither the November 15, 2004 agreement nor the January 31, 2007 agreement specifically define "commitment to purchase." However, the January 31, 2007 agreement elaborates on what is required for SELA to incur liability for payment of a fee to Dutruch. According to the agreement, SELA is not liable to Dutruch for a finder's fee unless and until SELA, in its sole discretion, accepts the terms of a purchase agreement with a potential buyer. Accordingly, under the plain language of the agreements, Dutruch has to establish that SELA accepted a purchase agreement within the three-year term of the agreement to establish that he is entitled to a finder's fee.

From our review of the record, there is no dispute that Dutruch failed to present SELA with a purchase agreement from the Parish or that SELA failed to accept a purchase agreement from the Parish during the three-year term of the

agreement. Further, there is no dispute that SELA did not execute a purchase agreement or close on the sale of SELA within the three-year term. Therefore, under a plain reading of the agreements, Dutruch failed to establish entitlement to a fee prior to the expiration of the agreements' three-year term.

Furthermore, we find no merit to Dutruch's argument that, despite the expiration of the agreements, he is still entitled to a fee, because he was the procuring cause of the ultimate sale between the Parish and SELA in March 2010.

Under the jurisprudence, 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., 09-2145, p. 8 (La. App. 1st Cir. 7/9/10), 42 So. 3d 1116, 1122, writ denied, 10-1841 (La. 10/29/10), 48 So. 3d 1092. Procuring cause has been defined 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., 09-2145 at p. 9, 42 So. 3d at 1123 (citing Creely, 437 So. 2d at 820-21) (emphasis added.) 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., 09-2145 at p. 9, 42 So. 3d at 1123.

In the instant case, it is undisputed that Dutruch is not a real estate broker, but rather, an electrical engineer. Other than a few cases involving commissions under employment agency contracts, the procuring cause doctrine has not been extended beyond real estate or other brokerage contracts. See Fox v. Don Siebarth

Pontiac, Inc., 458 So. 2d 575, 578 (La. App. 3rd Cir.), writ denied, 461 So. 2d 314 (La. 1984) (finding that procuring cause, which is established in the law of real estate brokerage contracts, does not operate as a legal principle compelling the vesting of an earned commission in the sale of a car.) However, assuming *arguendo* that the procuring cause doctrine applies in the instant case, we still find that Dutruch has failed to establish that he was the procuring cause of the March 2010 sale between SELA and the Parish.

According to the record, Dutruch performed preliminary work and recommended to SELA that a public entity would be the most advantageous buyer. Thereafter, Riecke relayed the Parish's interest in buying SELA to Dutruch and the other exclusive agents, who then initiated conversations with the Parish regarding the sale. Dutruch and the other agents were successful in procuring an offer of $39,000,000 from the Parish for SELA, but this offer was rejected. After rejecting the Parish's offer, SELA informed Dutruch, the other exclusive agents, and the Parish in October and November 2007 that SELA was going to continue to operate its business and explore other opportunities. In March 2008, negotiations resumed with the Parish after Cucchiara approached Riecke following an encounter in with a Parish representative, wherein the Parish representative expressed that the Parish may be interested in talking again. A sale of SELA's assets was ultimately consummated in March 2010—over two years following the expiration of the agreement between Dutruch and SELA. Dutruch admitted in his deposition that, after expiration of the agreement, he did not perform any additional work in conjunction with the sale of SELA to the Parish, nor did he speak with Parish representatives regarding the purchase of SELA or its assets, other than a lunch meeting with a Parish representative in early 2010, wherein he confirmed the sale of SELA to the Parish.

Therefore, considering the length of time that lapsed between the termination of Dutruch's agreement with SELA and the sale of SELA's assets to the Parish, the fact that Riecke had terminated discussions with the Parish and decided to continue operating his business and explore other opportunities, and the fact that negotiations were renewed because of the efforts of individuals other than Dutruch, we find that Dutruch has failed to establish that his efforts were the procuring cause of the March 2010 sale of SELA's assets to the Parish.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the trial court granting summary judgment in favor of Southeastern Louisiana Water and Sewer Co., LLC and Jared Riecke, and dismissing Kenneth Dutruch's claims with prejudice. All costs of this appeal are assessed to Kenneth Dutruch.

AFFIRMED.