STATE OF MICHIGAN

COURT OF APPEALS

THOMAS A. DUKE, CO.,

Plaintiff-Appellee,

v

TRAUBEN & COMPANY, INC., f/k/a QMI INCORPORATED, and JEFFREY P. TRAUBEN,

Defendants-Appellants.

UNPUBLISHED
October 19, 2001

No. 221341
Oakland Circuit Court
LC No. 97-538900

Before: Cooper, P.J., and Sawyer and Owens, JJ.

PER CURIAM.

In this breach of contract action, defendants appeal as of right from a judgment awarding plaintiff $60,900 following a bench trial. We affirm in part, reverse in part, and remand for further proceedings.

This case arises out of defendant Jeffrey Trauben's (Trauben) endeavor to sell property known as the QMI Building, that was owned by his company, defendant Trauben & Company, Inc. Toward this endeavor, Trauben entered into two exclusive right to sell agreements with plaintiff, a real estate brokerage company, that ended on October 1, 1995 and October 1, 1996, respectively. The agreements provided that plaintiff would be entitled to a commission if a purchaser was obtained during the life of the agreements "by anyone, including the Seller(s) ...." Plaintiff was also granted the right to a commission for a sale that was not consummated "because of the default of the Seller(s) or because of misrepresentations of Seller(s)." The agreements also specified:

> Furthermore, Broker shall be entitled to such compensation if the property is sold, leased, conveyed or otherwise transferred within one hundred eighty (180) days after termination of this authority, or any extension thereof (which shall include relistings), to anyone with whom the Broker has had negotiations or to anyone who has had the property offered to him prior to final termination of authority. This extension shall apply to options to purchase granted before the authority

terminates or during such 180-day period after termination of authority and the option is exercised after the termination of said 180-day extension.[1]

On January 17, 1997, the QMI Building was sold to Light & Hardy Investments, Inc., a company owned by John Light and Douglas Hardy (Hardy). The trial court determined that plaintiff was entitled to a commission because Hardy, a tenant of the QMI Building, and Trauben had discussed an offer to purchase the QMI building on September 17, 1996, prior to the termination of the exclusive right to sell agreement. When computing the commission amount, the trial court looked to the unconsummated purchase offer of $870,000, made by Richard Daguanno and Mark Accetura on October 16, 1996, wherein Trauben had agreed to pay plaintiff's seven percent commission if the sale was consummated. The trial court stated:

> I had to decide what sum of money it was that would produce a commission for Mr. Duke, and the sum of money is the Daguanno-Accetura offer.
>
> It appears that there is some evidence of fraud and misrepresentation. There is evidence. There is, in fact, fraud and misrepresentation relative to the time between October 16th, when the Daguanno offer was executed, and November 7th, when the Daguanno offer was off the table. And it cannot be a mere coincidence that there is a $60,000 difference between the Daguanno-Accetura offer and the ultimate sale price of this property. It strikes me that $60,900 is an appropriate judgment to be entered in favor of the plaintiff plus costs.

I

We review the trial court's findings of fact under the clearly erroneous standard. MCR 2.613(C); *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000). However, the trial court's conclusions of law are subject to de novo review. *Id.*

Defendants first argue that the trial court incorrectly relied on the Daguanno-Accetura offer to determine that plaintiff was entitled to a commission. We find that defendants have misconstrued the trial court's findings with regard to the Daguanno-Accetura offer. Although the court looked to the Daguanno-Accetura offer to determine the amount of the commission owed, the court's findings reflect that it's determination of liability for a commission was based on evidence that Hardy and Trauben had discussed an offer of purchase prior to October 1, 1996. The trial court stated:

> I mean, there are two ways that I can find for this plaintiff. One is – because I do find, as a matter of fact, without regard to anything else, as familiar as I have become with this case, there is no question in my mind that on

[1] Unless otherwise specified, any subsequent references in this opinion to the exclusive right to sell agreements will be to the second agreement (Effective October 1, 1995 to October 1, 1996).

> September 17th, 1996, Mr. Trauben and Mr. Hardy discussed the sale of the property. No question whatsoever.
>
> So, if there is some novel legal theory that is going to say that the agreement was not signed on . . . November 4th – the agreement between Mr. Hardy and Mr. Trauben was not signed on November 4th before the Daguanno deal officially fell through, even so, Mr. Duke is entitled to a commission, because Mr. Trauben agreed that – and he's testified under oath . . . that he understood that if he or anyone else discussed an offer to purchase during the course of the exclusive right to sell, Mr. Duke would – and that resulted in a sale, Mr. Duke would be entitled to a commission.

Because defendants do not challenge the basis for the trial court's finding of liability for a commission, we will assume for purposes of defendants' first issue that liability for the commission may properly be predicated on the actual sales transaction that resulted in the conveyance to Light & Hardy Investments, Inc. See *Joerger v Gordon Food Svc, Inc*, 224 Mich App 167, 175; 568 NW2d 365 (1997) (failure to address the basis of a trial court's decision may preclude appellate relief). Defendants do, however, dispute the propriety of the trial court's decision to look to the Daguanno-Accetura offer to determine the amount of the commission.

Plaintiff's claim for a commission was based on the exclusive right to sell agreement. The primary goal when construing a contract is to honor the parties' intent. *Rasheed v Chrysler Corp*, 445 Mich 109; 127, n 28; 517 NW2d 19 (1994). A clear and unambiguous contract is construed as a matter of law. *Port Huron Ed Ass'n v Port Huron Area School Dist*, 452 Mich 309, 323; 550 NW2d 228 (1996). If the contract is unclear or susceptible to multiple meanings, it is interpreted as a question of fact. *Id.* Ambiguities are construed against the drafter of the contract. *DeMello v McNamara*, 178 Mich App 618, 623; 444 NW2d 149 (1989).

Initially, we conclude that the trial court erred, as matter of law, to the extent that it relied on the Daguanno-Accetura offer to determine the measure of the commission due plaintiff. The language of the exclusive right to sell agreement provided that liability for a commission and the measure of the commission were to be based on the same sales transaction. Moreover, the exclusive right to sell agreement specifies the following circumstances for looking to an unconsummated sale:

> Seller(s) understand that a commission will be due the Broker if the sale is not consummated because of the default of the Seller(s) or because of misrepresentations of Seller(s).

The trial court's findings fail to explain how seller default or seller misrepresentation affected the Daguanno-Accetura sale. In fact, there is no indication that either seller default or seller misrepresentation caused the Daguanno-Accetura offer to fail.

With regard to the requirement of a seller misrepresentation, we note that, while the trial court found evidence of "fraud" or "misrepresentation," it specifically stated that the Daguanno-

Accetura sale fell apart because Hardy refused to modify his leases for the QMI Building.[2] According to the exclusive right to sell agreement, the misrepresentation had to be the reason for the failure of the sale. Consequently, we conclude that the trial court's reliance on a "fraud" or "misrepresentation" standard to justify using the unconsummated Daguanno-Accetura offer for determining a commission was incorrect as a matter of law.

Further, there is no indication of seller default. In this regard, we note that a contract condition may relate to either the existence of a contract or a duty of performance under a contract. *Modern Globe, Inc v 1425 Lake Drive Corp,* 340 Mich 663, 668; 66 NW2d 92 (1954). The exercise of the condition by Daguanno and Accetura to terminate the sale does not constitute a seller default on behalf of Trauben.

In fact, Trauben had no duty to submit the Daguanno-Accetura offer to Hardy. Rather, Trauben's acceptance of the Daguanno-Accetura offer was conditioned on Hardy's right of first refusal to purchase the property. An acceptance must be absolute and unconditional. *Marshall Mfg Co v Berrien County Package Co*, 269 Mich 337, 339; 257 NW 714 (1934). Moreover, Hardy's lease with Trauben only required Trauben to submit a bona fide purchase agreement to Hardy for a right of first refusal. The conditions attached to the Daguanno-Accetura offer were inconsistent with a bona fide purchase agreement for purposes of a right of first refusal because they did not bind Daguanno and Accetura to purchase the QMI Building.[3] Cf. *DeMello, supra* at 623. See also *A & E Holding, Inc v Consumers Petroleum Profit Sharing Trust*, unpublished opinion per curiam of the Court of Appeals, issued June 8, 2001 (Docket Nos. 214874 and 220990).[4] Nevertheless, because Hardy's right of first refusal was not the reason found by the trial court for the failure of the sale, it is immaterial to plaintiff's entitlement to a commission.

Consequently, we hold that the trial court erred, as a matter of law, in ordering a commission measured by the unconsummated Daguanno-Accetura offer.

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[2] Hardy's refusal to modify his leases was related to a condition of the Daguanno-Accetura offer, namely, their ability to "terminate" the agreement if "the "lease(s), or other related documents or Purchasers [sic] negotiations with Century 21 for Purchasers [sic] future occupancy, are unacceptable to Purchaser."

[3] For example, the purchase agreement provided Daguanno and Accetura with the unfettered right to terminate the agreement if the leases were unsatisfactory.

[4] Although an unpublished opinion is not precedentially binding, MCR 7.215(C)(1), we find the analysis in *A & E Holding, Inc, supra,* persuasive for the proposition that a purchaser's offer, which is subject to specified conditions such as satisfaction with the property, is an offer to enter into a option contract. Cf. *Genesis Center, PLC v Blue Cross & Blue Shield of Michigan*, 243 Mich App 692, 696; 625 NW2d 37 (2000).

II

Defendants next raise three issues concerning the question of liability for a commission predicated on the actual sale of $810,000 reflected in the warranty deed to Light & Hardy Investments, Inc. We decline to consider defendants' first two claims concerning whether Duke negotiated or offered the QMI Building to Hardy because, as conceded by defendants, these claims were not the basis for the trial court's finding of liability. This Court will generally decline to address moot issues. *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998).

Defendants' third issue concerns whether plaintiff may recover a commission based on the procuring theory of liability, as set forth in *Murphy Real Estate Corp v Barron*, 55 Mich App 210, 212; 222 NW2d 184 (1974). However, the trial court did not apply this theory to find liability, but looked to the language of the exclusive right to the sell agreement and evidence that Trauben and Hardy had discussed an offer to purchase on September 17, 1996. Because the trial court's opinion does not reflect that it applied the procuring theory of liability, we decline to address defendants' arguments regarding this theory. *B P 7*, *supra* at 359.

Furthermore, we find that defendants' failure to support their third claim with citation to supporting facts in the record precludes appellate review. "A party may not leave it to this Court to search for a factual basis to sustain or reject its position." *Great Lakes Div of Nat'l Steel Corp v City of Ecorse*, 227 Mich App 379, 424; 576 NW2d 667 (1998). Defendants' mere assertion that the 180-day provision in the exclusive right to sell agreement, for sales completed after October 1, 1996, applies only to broker negotiations and broker offers is insufficient to invoke appellate review. *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984).

In fact, parties may enter into a contract for a broker to be paid a commission based on a sale made by an owner. *Pittelkow v Jefferson Park Land Co, Ltd*, 283 Mich 374, 377; 278 NW 102 (1938); *Axe v Tolbert*, 179 Mich 556, 563-564; 146 NW 418 (1914). The exclusive right to sell agreement in the case at bar contains such a provision by providing for a commission if a purchaser was obtained by "anyone, including the Seller(s) . . . ." While the subsequent 180-day provision is limited to the broker with regard to "negotiations," this limitation was not stated for offers made before the final termination of authority. In light of the express language in the 180-day provision for offers and the trial court's findings regarding the September 17, 1996, offer to purchase, we conclude that defendants' cursory argument provides no basis for disturbing the trial court's holding.

III

Lastly, defendants challenge the trial court's use of a seven percent commission. Defendants contend that any commission awarded should either be based on the four percent rate stated in the October 7, 1996 letter or reduced by fifty percent according to plaintiff's cooperative agreement with Morris & Berke. We disagree.

Defendants mere assertion that the October 7, 1996 letter must apply affords no basis for relief. Likewise, defendants have failed to cite to any legal authority for their proposition that

they can avoid their contractual obligations to plaintiff because of plaintiff's contractual obligations to another company. Consequently, we decline to address these issues. *Goolsby, supra* at 655, n 1.

Because we find that the trial court based defendants' liability on the breach of the exclusive right to sell agreement, that occurred when Trauben offered the property to Hardy before the expiration of the agreement, plaintiff's commission should be governed by the agreement's contractual terms. The exclusive right to sell agreement provided for a seven percent commission rate.[5] It is undisputed that Hardy purchased the property from Trauben for $810,000. Therefore, we remand for a determination of plaintiff's commission based upon the $810,000 sale to Hardy and the seven percent rate.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jessica R. Cooper
/s/ David H. Sawyer
/s/ Donald S. Owens

[5] Defendants' claim that the typographical error in the exclusive right to sell agreement must be applied, whereby the commission for an "in house" transaction would be six percent, lacks citation to any supporting authority and need not be addressed. *Goolsby, supra* at 655, n 1.