STATE OF MICHIGAN

COURT OF APPEALS

RE/MAX ADVISORS, INC.,

Plaintiff-Appellant,

v

JOHN BAKUN and BARBARA BAKUN,

Defendants-Appellees,

and

MARK LICATOVICH and THERESA LICATOVICH,

Defendants.

UNPUBLISHED
January 29, 2002

No. 224814
St. Clair Circuit Court
LC No. 98-001268-CK

Before: Cavanagh, P.J., and Doctoroff and Jansen, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's judgment awarding it a real estate commission of $3,480 plus costs and court fees. Pursuant to MCR 7.216(A)(7), we reverse and remand for entry of judgment in favor of defendants-appellees.

The parties filed stipulated facts before the trial court and the same stipulated facts are before us on appeal. See MCR 7.210(B)(1)(e). On September 9, 1997, plaintiff and the Bakuns entered into a listing agreement to sell the Bakuns' house at a listing price of $695,000. The listing agreement expired on November 11, 1997, and because the house had not sold by that time, the parties entered into a second listing agreement. The second listing agreement was in effect from November 11, 1997, until January 12, 1998. Again, the house did not sell during the second listing period.

At the end of January 1998, plaintiff had potential buyers for the house and entered into a one-party listing agreement on January 28, 1998. This agreement specifically stated that if "a sale is consummated to the above prospective purchaser [the Licatoviches] within one year," then plaintiff would be entitled to a six percent commission. On January 31, 1998, the Bakuns and the Licatoviches entered into a buy and sell agreement in which the sale price was to be $670,000 and the sale would be effectuated by a land contract. An addendum to the offer to purchase, also dated January 31, 1998, acknowledged that there was an existing mortgage on the

property that contained a due-on-sale clause. The parties agreed in the addendum that the mortgagor would not be contacted regarding the sale of the house on the land contract. The land contract sale addendum, also signed on January 31, 1998, stated that the Licatoviches would make a down payment of $40,000, pay $3,000 a month for the first year, $5,000 a month for the following two years, and the balance would "balloon" at the end of three years. The Licatoviches paid $5,000 in deposit money to plaintiff on January 31, 1998.

Shortly thereafter, there were some concerns about the due-on-sale clause, and the Bakuns and Licatoviches decided to modify the land contract sale to a lease with an option to purchase agreement. Plaintiff was later notified of the buyers' and sellers' decision to change the land contract sale to a lease with an option to purchase agreement. On February 20, 1998, plaintiff prepared the documents and faxed a lease with an option to purchase agreement and a page from the title commitment indicating a requirement for the Bakuns to pay off the mortgage to the Licatoviches. Later that evening, Mr. Licatovich contacted Mr. Bakun by telephone and was concerned about the language in the lease with an option to purchase agreement. Mr. Bakun then asked plaintiff to revise the proposed land contract to be a lease with an option to purchase agreement. Plaintiff advised against this request.

On February 24, 1998, the Bakuns and Licatoviches entered into a lease with an option to purchase agreement that had been prepared by Mrs. Bakun. The sale price was for $670,000, with a down payment of $40,000. The Licatoviches were to pay $3,000 a month for the first year, $5,000 a month for the second and third years, and a balloon payment after three years due on April 1, 2001. Addeddum A to the contract, also dated February 24, 1998, specifically stated that the contract is a lease with an option to purchase, and the Licatoviches paid $35,000 to the Bakuns.

On March 3, 1998, Mr. Bakun took the lease with an option to purchase agreement to plaintiff. Plaintiff wanted Mr. Bakun to grant a lien to plaintiff on the house for the commission, but Mr. Bakun refused. The parties attempted to negotiate a settlement regarding the commission, but no agreement was ever entered into. On April 21, 1998, plaintiff filed a two-count complaint alleging breach of contract and fraud.

In the meantime, the Licatoviches made lease payments of $3,000 a month for the months of March, April, May, June, July, and August in 1998, but stopped payment after that month. The Bakuns sought repossession of the house in a landlord-tenant eviction proceeding in the district court. That proceeding resulted in a judgment of possession to the Bakuns on September 21, 1999.

The parties submitted their respective positions to the trial court and utilized stipulated facts and trial briefs. Plaintiff essentially argued that it was entitled to the full commission stated in the one-party listing agreement, that being $40,200. Defendants maintained that plaintiff was not entitled to a commission because no sale was ever consummated, as specifically stated in the one-party listing agreement. The trial court heard oral arguments and ruled on the matter in a hearing held on December 17, 1999. The trial court ruled that plaintiff was entitled to a commission because plaintiff had brought the parties together and those parties reached an agreement regarding the property. The trial court further ruled that awarding plaintiff the full commission of $40,200 would not be equitable because plaintiff "did not act with completely clean hands in this transaction as evidenced by a willingness to skirt around the due-on-sale

clause contained in Bakun's mortgage." The trial court looked instead to the amount of defendants' enrichment. The trial court noted that the buyers had paid $18,000 in rent before defaulting on the lease, as well as a $40,000 deposit, for a total of $58,000. Using the six percent commission figure from the one-party listing agreement, the trial court awarded plaintiff a commission of $3,480.

On appeal, plaintiff contends that the trial court erred in calculating its commission and argues that it should be awarded $40,200. This case involves the interpretation of a contract, which question is reviewed de novo. *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 238; 615 NW2d 241 (2000). Further, the question whether contractual language is ambiguous is a question of law and, if the contractual language is clear and unambiguous, its meaning is also a question of law. *Port Huron Educ Ass'n v Port Huron Area School Dist*, 452 Mich 309, 323; 550 NW2d 228 (1996). Upon review of the stipulated facts and, most importantly, the one-party listing agreement, we find that because no sale was ever consummated, as required by the one-party listing agreement, plaintiff is not entitled to a commission.

The trial court erred in ruling that plaintiff was entitled to a commission because it did not apply the clear and unambiguous language in the one-party listing agreement to the undisputed, stipulated facts of this case. See *Henderson v State Farm Fire & Casualty Co*, 460 Mich 348, 353; 596 NW2d 190 (1999) (If a word or phrase in a contract is unambiguous and no reasonable person could differ with respect to application of the term or phrase to undisputed material facts, then the court should grant summary disposition to the proper party under MCR 2.116(C)(10)). Usually, in order for a real estate broker to recover a commission where there is an express written contract, the broker must show performance on the contract. *Hawkins v Smithson*, 181 Mich App 649, 652; 449 NW2d 676 (1990). "The court must look to the terms of the contract to determine how the commission was to be earned." *Id.* Instead, the trial court appeared to have applied the general rule that "a real estate broker is entitled to the agreed commission when the broker produces a ready, willing, and able buyer." 1 Cameron, Michigan Real Property Law (2d ed), § 14.14, p 492. A broker produces a buyer when the broker is the procuring cause of a purchaser, meaning that the purchaser learned of the property through the broker and the sale resulted from the broker's efforts. *Id*. Generally, a broker earns a commission when the seller and purchaser enter into a binding agreement. *Id.* However, the parties may contract to provide that the commission is contingent on "completion of the deal" or "consummation of the sale." *Id*. Here, the parties clearly agreed that plaintiff was not entitled to a commission until a sale was consummated.

A review of the stipulated facts reveals that no sale was ever consummated in this case. Although the parties initially entered into a land contract as a sale for the property, no closing ever occurred and the parties ultimately modified the land contract into a lease with an option to purchase agreement that was signed on February 24, 1998. Payments were made under the lease with an option to purchase agreement for several months before the Licatoviches failed to make their monthly payments and were ultimately evicted as tenants. A lease with an option to buy agreement is not a binding contract of sale because an option does not bind the prospective purchaser to buy the property. *DeMello v McNamara*, 178 Mich App 618, 623; 444 NW2d 149 (1989). Because the clear language of the one-party listing agreement required that a sale be consummated between the Bakuns and the Licatoviches for plaintiff to be entitled to a six percent commission, and no sale was ever consummated, plaintiff is not entitled to any

commission. Accordingly, the trial court erred in ruling that plaintiff was entitled to a commission.

Reversed and remanded for entry of judgment in favor of defendants-appellees. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Martin M. Doctoroff
/s/ Kathleen Jansen