

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

JS PRODUCTIONS, INC., et al.	:	
Plaintiffs-Appellees,	:	CASE NO. CA2011-02-029
- vs -	:	<u>OPINION</u>
	:	9/19/2011
G129, LLC, et al.,	:	
Defendants-Appellants.	:	

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2008-07-3297

William M. Gustavson, 778 Old State Route 74, Cincinnati, Ohio 45245, for plaintiffs-appellees

Lierman & Cornwell Co., L.P.A., Jeff J. Cornwell, 7182 Liberty Centre Drive, Suite N, West Chester, Ohio 45069, for defendant-appellant, G129 and defendant/third-party plaintiff, Tomas R. Fiehrer

POWELL, P.J.

{¶1} Defendant-appellant, G129, appeals from a decision of the Butler County Common Pleas Court awarding \$54,000 in damages to plaintiffs-appellees, J.S. Productions and Joanne Serdar, on their unjust enrichment claim. We affirm.

{¶2} G129 is a holding company that owned a 27-acre parcel of land at the corner of Gilmore and Princeton Roads in Butler County, Ohio. G129's managing partner

and financial backer is Tomas Fiehrer. Serdar is the president and sole shareholder of J.S. Productions, a corporation that provides brokerage services for both sellers and buyers in real estate transactions.

{¶3} In February 2006, Serdar contacted Fiehrer and offered to help G129 develop its 27-acre parcel. Fiehrer told Serdar that he planned to move his dealership to the 17.5-acre back lot of the 27-acre parcel, but was interested in selling the "three, possibly four" "out lots" or "outparcels" in the 6.5 acres in the front section of the 27-acre parcel. Serdar began marketing the outparcels and soon obtained letters of intent from several companies, including Frisch's Restaurants. In June 2006, G129's attorney, Dale Lierman, offered Serdar the opportunity to list the outparcels, which Serdar accepted.

{¶4} On June 30, 2006, J.S. Productions and G129 entered into a written brokerage agreement granting J.S. Productions the exclusive right to render brokerage services to G129 as to the outparcels for a 60-day period commencing on July 5, 2006. G129 agreed to pay J.S. Productions a six percent commission on the gross sale price of any outparcel sold, with payment of the commission made "contingent upon the consummation of a sales contract" during the agreement's 60-day term, or during the agreement's six-month "residual protection period" that commenced following the expiration of the 60-day term. In August 2006, Serdar sought a six-month extension of the parties' brokerage agreement, but G129 would not grant her one. The parties' 60-day brokerage agreement expired on September 4, 2006.

{¶5} In February 2007, Lierman called Serdar and told her that G129 was no longer interested in developing its 27-acre parcel, itself, and instead, wanted to sell the property to a developer. On February 9, 2007, Serdar sent Fiehrer another request to extend the terms and conditions of the parties' brokerage agreement and a list of several developers who might be interested in buying a portion of G129's 27-acre parcel,

including Anchor Acquisitions, Ltd. However, G129 again refused to extend the parties' brokerage agreement.

{¶6} On April 27, 2007, Anchor entered into a tentative agreement to purchase from G129 the 17.5-acre back lot of its 27-acre parcel where Fiehrer had intended to relocate his car dealership, with the sale conditioned on Anchor being able to find a "big box" tenant (e.g., a Kroger or a Walmart) for the lot. In August 2007, Anchor sent notice to G129 that it intended to exercise its option to terminate their contract for the 17.5-acre back lot because it was unable to find a big box tenant. However, Anchor indicated that it might be interested in purchasing the 6.5 acres in the front section of the 27-acre parcel. On September 17, 2007, Anchor and G129 formally terminated their contract regarding the 17.5 acre lot, and entered into an agreement for Anchor to purchase the 6.5 acres for \$1.1 million.

{¶7} On March 19, 2008, Anchor notified G129 that because of the credit crunch, the state of the economy, and difficulties with the county engineer, Anchor might not be able to continue with the development project, and therefore Anchor requested a \$200,000 reduction in the sales price of the 6.5 acres. On April 15, 2008, G129 notified Anchor that it agreed to accept \$900,000 for the 6.5 acres. When Serdar learned of G129's sale of the 6.5 acres to Anchor, she sent G129 an invoice for \$54,000, representing a six percent commission on the \$900,000 purchase price. When G129 refused to pay the invoice, Serdar, acting through J.S. Productions, filed a broker's lien against the property to stop the closing on G129's sale of the 6.5 acres to Anchor. G129 then placed \$54,000 into escrow to allow the closing to take place.

{¶8} In July 2008, Serdar, acting through J.S. Productions, brought suit against G129 and Fiehrer, raising numerous claims, including ones for breach of contract and quantum meruit or unjust enrichment. G129 and Tomas Fiehrer filed an answer and

counterclaim to J.S. Productions' complaint, as well as a third-party complaint against Serdar, alleging, among other things, that J.S. Productions and Serdar had breached their fiduciary duties owed to G129.

{¶9} In 2010, a two-day hearing was held on the parties' claims. Afterwards, the magistrate issued a decision finding that G129 was liable to J.S. Productions and Serdar for damages in the amount of \$54,000 under a theory of unjust enrichment. In 2011, the trial court issued a decision sustaining Fiehrer's objection to the portion of the magistrate's decision indicating that Fiehrer was personally liable for the \$54,000 judgment, but overruling G129's remaining objections and adopting the magistrate's decision as its own in all other respects.

{¶10} G129 now appeals, assigning the following as error:

{¶11} Assignment of Error No. 1:

{¶12} "THE TRIAL COURT ERRED AS A MATTER OF LAW IN ADOPTING THE MAGISTRATE'S FINDING IN FAVOR OF PLAINTIFF/APPELEE ON ITS CLAIMS OF UNJUST ENRICHMENT/QUANTUM MERUIT."

{¶13} G129 argues the trial court erred in allowing J.S. Productions and Serdar to recover \$54,000 in damages under a theory of quantum meruit or unjust enrichment, because the parties' July 5, 2006 brokerage agreement defined their relationship and rights, and since the agreement expired before Anchor purchased the 6.5 acres from G129, J.S. Productions and Serdar were not entitled to recover any commission under the terms of the agreement. G129 asserts that under cases like *R. Corwin Pauly, Jr. and Associates v. Keko Corp.*, 146 Ohio App.3d 669, 2001-Ohio-4351, J.S. Productions and Serdar were not entitled to seek equitable relief under a theory of unjust enrichment, either. We conclude that while J.S. Productions and Serdar were not entitled to recover under the terms of the parties' July 5, 2006 brokerage agreement, J.S. Productions and

Serdar were entitled to recover damages against G129 under a theory of quantum meruit or unjust enrichment.

{¶14} Generally, a broker's right to receive compensation for his or her services rests upon an express or implied contract. *Ostendorf-Morris Co. v. Slyman* (1982), 6 Ohio App. 3d 46, 47, citing *Suter v. Farmers' Fertilizer Co.* (1919), 100 Ohio St. 403. "An implied contract may be created when a seller authorizes the broker to produce a buyer under circumstances which should reasonably cause the owner to believe he will be expected to compensate the broker for those services." *Slyman* at 47. In *Legros v. Tarr* (1989), 44 Ohio St. 3d 1, 6-7, the court discussed the differences between express and implied contracts and the different types of implied contracts:

{¶15} "[I]t is well-established that there are three classes of simple contracts: express, implied in fact, and implied in law. [Citations omitted.] 'In express contracts the assent to its terms is actually expressed in offer and acceptance. In contract implied in fact the meeting of the minds, manifested in express contracts by offer and acceptance, is shown by the surrounding circumstances which made it inferable that the contract exists as a matter of tacit understanding. In contracts implied in law there is no meeting of the minds, but civil liability arises out of the obligation cast by law upon a person in receipt of benefits which he is not justly entitled to retain and for which he may be made to respond to another in an action in the nature of assumpsit. Contracts implied in law are not true contracts; the relationship springing therefrom is not in a strict sense contractual but quasi-contractual or constructively contractual. In truth contracts implied in law are often called quasi contracts or constructive contracts. [Citation omitted.] * * * [Citation omitted.]'"

{¶16} The parties' brokerage agreement terminated on September 4, 2006, and the agreement's six-month protection period terminated on March 3, 2007. No sales

contract between G129 and a purchaser was consummated by September 4, 2006. Moreover, while Serdar introduced G129 and Anchor prior to the March 3, 2007 expiration of the agreement's six-month residual protection period, J.S. Productions and Serdar were not entitled to recover a commission under that provision of the parties' brokerage agreement. The residual-protection-period clause of the parties' brokerage agreement states:

{¶17} "[N]o termination, non-renewal or other expiration of this Agreement shall be deemed to affect the Broker's [J.S. Productions' and Serdar's] entitlement hereunder to a Transaction Fee earned during the period ending six months following the termination, non-renewal or other expiration of this Agreement *for all prospects with which Broker has had substantive discussions during the initial term of this Agreement.* Furthermore, the expiration date shall be extended through the closing date of any pending transaction as to that pending transaction only." (Emphasis added.)

{¶18} There was no evidence that J.S. Productions and Serdar "had substantive discussions" with Anchor regarding any portion of G129's 27-acre parcel during the initial term of the parties' brokerage agreement, i.e., from July 5, 2006 to September 4, 2006. Consequently, J.S. Productions and Serdar were not entitled to a commission under the residual protection period set forth in the parties' brokerage agreement.

{¶19} Notwithstanding the foregoing, we agree with the trial court that J.S. Productions and Serdar were entitled to compensation under the doctrine of quantum meruit or unjust enrichment. A party is entitled to recover under the theory of quantum meruit or unjust enrichment if he or she can establish that (1) his or her actions conferred a benefit on the defendant, (2) the defendant knew of the benefit that had been conferred upon him or her, and (3) it would be unjust to allow the defendant to retain the benefit conferred upon him or her without requiring the defendant to pay for that benefit. *Maghie*

& *Savage, Inc. v. P.J. Dick Inc.*, Franklin App. No. 08APP-487, 2009-Ohio-2164, ¶133, citing *Hambleton v. R.G. Barry Corp.* (1984), 12 Ohio St.3d 179, 183.

{¶20} After the parties' initial brokerage agreement expired on September 4, 2006, Serdar did nothing to promote any portion of G129's 27-acre parcel until February 2007, at which time G129's attorney, Lierman, who had offered Serdar the right to list G129's outparcels in June 2006, told Serdar that G129 was no longer interested in developing its 27-acre property, itself, but instead, wanted to sell the property to a developer. Lierman asked Serdar to provide G129 with a list of developers who might be interested in purchasing all or part of G129's 27 acres. In response, Serdar provided Lierman with the names of several developers who might be interested in purchasing the land, including Anchor.

{¶21} The evidence supports the trial court's finding that during the negotiations between G129 and Anchor, Serdar maintained contact with both sides, providing assistance to them when needed, such as providing G129 with an estimate of the value of its property and providing Anchor with information regarding the "traffic count" for the lots it was interested in purchasing from G129. On April 27, 2007, G129 and Anchor entered into an agreement whereby Anchor agreed to purchase the 17.5-acre back lot of G129's 27-acre parcel. When that deal fell through, Serdar presented G129 with another letter of intent from Frisch's that indicated Frisch's desire to purchase some of G129's land. When Anchor decided to purchase the 6.5 acres containing the out lots, Serdar helped ensure the completion of Anchor's and G129's deal by providing Anchor with a viable, interested buyer, namely, Frisch's, for one of the out lots on the 6.5 acres.

{¶22} Additionally, each of the purchase agreements between G129 and Anchor, including the final one that culminated in the sale of the 6.5 acres that closed on June 30, 2008, contained a term stating that J.S. Productions was the only broker to whom any

commission was owed and that G129, alone, was responsible for paying any commission due to J.S. Productions. Also, Fiehrer testified that he believed that Serdar was acting as his agent at the time of this transaction, that Serdar would have been entitled to a commission up until the time she introduced Frisch's to Anchor—an act that Fiehrer viewed as disloyal and harmful to G129's interest, and that Fiehrer cited as his justification for not paying Serdar her commission. However, the trial court found that Serdar *did* tell G129 about Frisch's interest in purchasing some of G129's land, but that G129 chose to sell the land to Anchor, anyway.

{¶23} It is also apparent from the evidence that Serdar was the "procuring cause" of G129's sale of the 6.5 acres to Anchor. The term "procuring cause" is defined "as a cause originating a series of events, which, without break in their continuity, directly result in the accomplishment of the prime objective of the employment of the broker—producing a purchaser ready, willing, and able to buy real estate on the owner's terms." *Bauman v. Worley* (1957), 166 Ohio St. 471, 473. Courts must look at all the facts and circumstances in a particular case in determining the issue of procuring cause. See *Upper Valley Realty, Inc. v. Hanson*, Miami App. No. 2005-CA-5, 2006-Ohio-314, ¶26-30.

{¶24} In addition to the evidence outlined above regarding Serdar's efforts to help G129 complete its sale of the 6.5 acres to Anchor, Anchor's senior vice president, Matt Grever, testified that Serdar was "[a]bsolutely" entitled to a brokerage commission for the sale, because "she was the procuring cause" of the sale since "[s]he was the reason that Anchor * * * and G129 * * * got together."

{¶25} In support of its argument that the trial court erred in applying the doctrine of unjust enrichment to allow J.S. Productions and Serdar to recover damages against it, G129 relies on *R. Corwin Pauly, Jr. and Associates*, 2001-Ohio-4351. In that case, the court held that "[a] party seeking a remedy under a contract cannot also seek equitable

relief under a theory of quantum meruit, because the terms of the contract define the parties' relationship in the absence of fraud, bad faith, or illegality." *Id.* at ¶11. Relying on *R. Corwin Pauly, Jr. and Associates*, G129 argues the trial court erred in finding that J.S. Productions and Serdar were entitled to recover under a theory of unjust enrichment or quantum meruit because (1) the parties' July 5, 2006 brokerage agreement defined the parties' rights and responsibilities, (2) the parties' brokerage agreement expired well before the sale of the 6.5 acre lot was finalized in September 2007, and (3) there was no evidence of any fraud, bad faith, or illegality on G129's part. However, we find *R. Corwin Pauly, Jr. and Associates* distinguishable from this case.

{¶26} Here, G129, through its attorney, Lierman, contacted Serdar in February 2007 *after* the parties' July 5, 2006 brokerage agreement expired and requested her assistance in finding a developer who wanted to purchase G129's property. The trial court found Lierman to be G129's agent as well as its attorney, who "had full authority, and acted with such, throughout the timeframe at issue." Lierman's decision to request Serdar's assistance in finding a developer/purchaser for G129's 27-acre parcel after the parties' brokerage agreement had expired created a new relationship between the parties separate from the one they had created with their July 5, 2006 brokerage agreement that expired on September 4, 2006. Lierman realized or at least should have realized that Serdar expected to be paid for her brokerage services.

{¶27} More importantly, Fiehrer testified that he believed that Serdar was acting as G129's agent even after the parties' July 5, 2006 brokerage agreement expired, and he further testified that he believed Serdar was entitled to a commission up until the time she introduced Anchor to Frisch's. However, the evidence supports the trial court's finding that Serdar's actions in introducing Anchor to Frisch's did not prejudice G129, since G129 already knew of Frisch's interest in its property and decided to sell it to Anchor at a

reduced price, anyway. Thus, we conclude that under the circumstances of this case, J.S. Productions and Serdar were entitled to seek relief under a theory of unjust enrichment.

{¶28} In light of the foregoing, G129's first assignment of error is overruled.

{¶29} Assignment of Error No. 2:

{¶30} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT/APPELLANT IN ADOPTING THE MAGISTRATE'S FINDINGS WHICH DID NOT CONSIDER THE BAD FAITH OF JS PRODUCTIONS."

{¶31} G129 argues the trial court erred in failing to address its claim that J.S. Productions acted in bad faith when it failed to disclose that Frisch's was interested in buying a portion of the 6.5 acres at the time G129 and Anchor were negotiating. G129 asserts that Anchor convinced it that Anchor did not have any prospective buyers for any of the out lots in the 6.5 acres, and that, as a result, Anchor would have to cancel its deal with G129 unless there was a reduction in the \$1.1 million sales price. G129 contends that J.S. Productions was aware that Frisch's was interested in buying a portion of the 6.5 acres and thus was obligated to disclose this material fact to G129, but did not do so since it wanted to obtain a commission from G129's sale of the 6.5 acres to Anchor and then a second commission from Anchor's re-sale of one of the out lots on the 6.5 acres to Frisch's. G129 contends that had it known that Frisch's was interested in purchasing one of the out lots on the 6.5 acres, "there was a real chance the deal between Anchor and G129 would fall apart." We find this argument unpersuasive.

{¶32} It is undisputed that the parties' 60-day brokerage agreement and the agreement's six-month residual protection period expired on March 3, 2007. Under R.C. 4735.74, a broker owes no further duty to his or her client after their brokerage agreement has terminated or expired except for "[p]roviding the client with an accounting of all

moneys and property relating to the transaction[,]" R.C. 4735.74(A), and "[k]eeping confidential all information received during the course of the transaction," R.C. 4735.74(B), except in certain circumstances, including where "[d]isclosure is necessary * * * to establish or defend a claim that a commission is owed on a transaction." R.C. 4735.74(B)(5). Serdar attempted to renew her brokerage agreement with G129 on two occasions, but Fiehrer refused both times.

{¶33} Even if Serdar was somehow obligated to disclose material facts to G129 when Lierman asked her to find a developer/purchaser for G129's 27-acre parcel, the evidence supports the trial court's finding that either Serdar did not fail to disclose any material facts to G129, or that G129 knew of the facts that Serdar allegedly failed to disclose. Specifically, the evidence shows that Serdar informed G129 of Frisch's interest in buying some of its land in April 2007 when G129 was negotiating with Anchor over the sale of the 17.5-acre back lot of the 27-acre parcel, and again in September 2007, when G129 was negotiating with Anchor over the sale of the 6.5 acres in the front portion of the 27-acre parcel. Additionally, G129 itself, through its counsel Lierman, had independent notice of Frisch's interest in the property, yet G129 still chose to accept a reduced price from Anchor for the 6.5 acres.

{¶34} The evidence also supports the trial court's finding that Sedar never acted contrary to G129's interests, but instead, ultimately acted in G129's best interest by introducing Anchor to Frisch's, because it helped ensure the closing of G129's sale of its 6.5 acres to Anchor. G129 and Fiehrer also failed to show that they were injured by Serdar's alleged failure of disclosure, as the evidence showed that Anchor, even with its pending sale of a portion of the 6.5 acres to Frisch's, was going to walk away from the deal without the \$200,000 price reduction. Also, Fiehrer testified that one of the reasons he accepted the \$200,000 price reduction was to reduce his "current note" so that he

could move his car dealership to the 27-acre parcel. Consequently, G129's decision to accept the \$200,000 reduction in the price for the 6.5 acres appears to have been a business decision that was unaffected by Serdar's alleged acts or omissions.

{¶35} Accordingly, G129's second assignment of error is overruled.

{¶36} Assignment of Error No. 3:

{¶37} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT/APPELLANT IN ADOPTING THE MAGISTRATE'S FINDINGS WHICH AWARDED JS PRODUCTIONS PAYMENT OF THE MONEY HELD IN ESCROW."

{¶38} G129 argues the trial court erred in awarding J.S. Productions and Serdar the \$54,000 held in escrow, because there was no written brokerage agreement between G129 and Anchor regarding the sale of the 6.5 acres, and therefore, G129 was not entitled to a broker's lien under R.C. 1311.86. However, G129 clearly suffered no material prejudice as a result of the broker's lien, as G129 subsequently sought and received permission from the trial court to use the \$54,000 that had been placed in escrow to serve as its appeal bond.

{¶39} Therefore, G129's third assignment of error is overruled.

{¶40} Cross-Assignment of Error No. 1:

{¶41} "THE DECISION OF THE TRIAL COURT WAS CORRECT FOR THE ADDITIONAL REASON THAT J.S. PRODUCTIONS WAS A THIRD-PARTY BENEFICIARY OF THE CONTRACT BETWEEN G129 AND ANCHOR ASSOCIATES FOR THE SALE OF THE 6.5 ACRE DEVELOPMENT PROPERTY."

{¶42} In their sole cross-assignment of error, J.S. Productions and Serdar argue the trial court's decision to award them \$54,000 in damages was correct for the additional reason that J.S. Productions was an intended third-party beneficiary of the contract between G129 and Anchor. However, this argument has been rendered moot as a result

of our disposition of G129's assignments of error, and therefore we need not decide it.

See App.R. 12(A)(1)(c).

{¶43} Judgment affirmed.

RINGLAND and HUTZEL, JJ., concur.