Reversed and Rendered and Memorandum Opinion filed August 24, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00343-CV

EXPO HOLDINGS, LP D/B/A EXPO MOTORCARS and G. MICHAEL KIM, Appellants

V.

PETER JACOBSON, Appellee

On Appeal from the County Civil Court at Law No. 3
Harris County, Texas
Trial Court Cause No. 905089

MEMORANDUM OPINION

In this breach of contract case, appellants, Expo Holdings, L.P. d/b/a Expo Motorcars ("Expo") and G. Michael Kim, appeal from the trial court's judgment in favor of appellee, Peter Jacobson. On appeal, appellants assert: (1) Jacobson was suing to recover brokerage fees within the meaning of the Real Estate License Act (the "Act"); (2) there is no evidence that Jacobson holds a valid broker's license as required by the Act; (3) there is no evidence that the contract sued upon was written as required by the Act; (4) there is no evidence that either Expo or Kim had a contractual duty to pay brokerage fees to Jacobson; (5) there is legally and factually insufficient evidence to support the

award of attorney's fees; and (6) the trial court erroneously awarded pre-judgment interest at the rate of ten percent. Because we agree that the Act prohibits Jacobson's recovery of any fee in this case, we reverse and render a take-nothing judgment in favor of appellants.

Factual and Procedural Background

The basic facts of this case are not in dispute. Jorge Lujan, sales manager for Expo at the time of these events, knew that Kim, the president of Expo, was searching for a larger property for Expo. Lujan had known Jacobson for several years and knew that Jacobson was involved in commercial real estate. Lujan introduced Jacobson to Kim, and, although the parties disagree about the specific details, Jacobson agreed to attempt to locate a property for Expo. Jacobson was to be paid a fee of three percent of the purchase price if Expo purchased a property he located. No written contract documented the details of the agreement. Jacobson located an acceptable property and began negotiations with the seller. Kim was prepared to make a purchase offer, so Jacobson and Lujan met for lunch to draft an offer letter. During their lunch meeting, Kim called Lujan and told him he preferred to use his own broker to close the transaction and asked him to inform Jacobson that his services were not needed. Jacobson left the lunch meeting and was not involved further in the property transaction. When Jacobson later discovered that Expo had moved to the property he had located, Jacobson contacted Kim and attempted to collect his fee.

After he was unsuccessful in collecting his fee, he sued Kim and Expo for breach of contract and quantum meruit. Expo and Kim filed a verified denial, in which they asserted, *inter alia*, (1) the affirmative defense of statute of frauds because Jacobson sought to recover brokerage fees on a real estate transaction but the contract alleged was not in writing, and (2) the contract was illegal because Jacobson was seeking to recover brokerage fees for a real estate transaction but admittedly was not a licensed real estate broker.

The case was tried to the bench. At the trial, Lujan testified that he, Jacobson, and Kim met shortly before the lunch meeting during which Jacobson's services were terminated. Lujan described this meeting as follows:

> This was shortly after we visited the location that [Kim] eventually purchased. We were just sitting outside his office at Expo Motorcars, and I had the idea, it just occurred to me, why have Expo pay Mr. Jacobson when [the property owner] is going to pay someone 6 percent for selling the property. Why not have them split the 6 percent and let Mr. Jacobson get 3 percent of it. And at that time [Kim] said that's a great idea. Does he have a real estate license? And I asked – Mr. Jacobson was sitting on the desk just down the hall. And I said, do you have a real estate license? And he said no, but that's not a problem. We run everything through the company, through my partner's company.

Kim stated that the reason he decided to end Jacobson's involvement in the transaction was that he discovered Jacobson was not a licensed broker:

> Well, [Lujan] let me know – [Lujan] told me that – I guess he went and asked Mr. Jacobson. [Lujan] came and told me that he was not a broker, that they had to bring in a friend, a third party to do the transaction since he was not a broker. . . .
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> I felt very uncomfortable. You know, I – I thought that Mr. Jacobson was representing me to do the deal, and then when I found out that he wasn't a licensed broker I felt very uncomfortable, uneasy. And – and since – you know, it just – it's just like, you know, if you were to tell me day before trial, say, Mike [Kim], I don't have a law degree, I'm not a lawyer, something of that nature, and I felt that there was – might be something going on. I definitely didn't want to bring somebody else in, a third party that I didn't know. And I thought there might have been something going on with maybe Mr. Lujan and Mr. Jacobson maybe under the table. I just – I didn't like the deal at all.

Kim had his own broker with whom he had been working for several years and preferred to close the transaction with this broker. Jacobson testified that he went to Expo after he was terminated, and Kim told him he would get his fee even if Kim had to "take it out of [his] own pocket."

Kim testified that the first attempted purchase of this property fell through because another buyer made a better offer. But several months later, the property owner contacted Kim's broker to explain that the sale to the other buyer had not worked out. Subsequent to the first offer, Kim explained he had formed another company, Myark Group, LP, through which to conduct his real estate transactions. The Myark Group, LP ultimately purchased the property that Jacobson had located for $1.5 million.

After the bench trial concluded, the trial court requested briefing from the parties on, as is relevant to this appeal, whether Jacobson could succeed in this suit even though he admittedly was not a licensed real estate broker. The trial court subsequently ruled in favor of Jacobson, awarding him $45,000.00 in damages (three percent of the $1.5 million purchase price of the property), attorney's fees and costs, and pre- and post-judgment interest. Expo and Kim requested findings of fact and conclusions of law, but the trial court did not file them. They also filed a motion for new trial, which was overruled by operation of law. This appeal timely ensued.

Discussion

Although appellants have raised six appellate issues, we only address those necessary for disposition of this case.

I. Did Jacobson sue to recover brokerage fees within the meaning of the Real Estate License Act?

In their first issue, Expo and Kim assert that they established, as a matter of law, Jacobson had sued for fees for acts constituting brokerage services under the Real Estate License Act. As is relevant here, the Act provides that a "broker" is an individual

> who, in exchange for a commission or other valuable consideration or with the expectation of receiving a commission or other valuable consideration, performs for another person one of the following acts . . . negotiates or attempts to negotiate the listing, sale, exchange, purchase, or lease of real estate; . . . [or] aids or offers or attempts to aid in locating or obtaining real estate for purchase or lease[.]

Tex. Occ. Code Ann. § 1101.002(1)(A)(iii), (viii) (Vernon 2004). Additionally, "a person acts as a broker . . . if, with the expectation of receiving valuable consideration, directly or indirectly performs or offers, attempts, or agrees to perform for another person any act described by Section 1101.002(1), as part of a transaction or as an entire transaction." *Id.* § 1101.004.

Here, Jacobson states in his petition, "Plaintiff was contacted by Jorge Lujan, the sales manager for Defendants, along with Defendant Michael Kim to discuss Plaintiff being retained to initially locate a site, and then later, a site with a building, for Defendants' business." He further alleges:

> The parties agreed that Plaintiff would be paid a consulting fee of 3% (typical commission structure is 3% for the Buyer's agent, 3% for the Seller's agent) of the purchase price of the property and building if a property was located by Plaintiff that meet [sic] the needs of Defendants. There was no written agreement documenting the contract.
>
> Thereafter Plaintiff began searching for a property that would meet Defendants' needs. After locating numerous properties that did not meet Defendants' needs, Plaintiff located a building and property. . . .
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> After Defendants agreed that the property was acceptable, Plaintiff began negotiations with the seller and eventually a deal was struck. The usual and customary work continued, including obtaining a survey of the property, moving towards a closing date. Plaintiff, Lujan, Seller's Broker, and Defendant Kim met at the site for an inspection that lasted approximately two hours prior to consideration of an offer. Once the inspection and other documents were obtained, Defendant Kim was ready to make an offer of purchase.

The trial testimony largely supports these allegations. The record reflects that Jacobson aided Expo and Kim in locating or obtaining real estate for purchase, and he further negotiated or attempted to negotiate the purchase of real estate. *Id.* § 1101.002(1). We thus conclude, based on both Jacobson's petition and the trial testimony, Jacobson was acting as a broker as contemplated by the Act. *See id.* §§1101.002(1); 1101.004; *see also Swor v. Tapp Furniture Co.*, 146 S.W.3d 778, 782 (Tex. App.—Texarkana 2004, no pet.)

(explaining that the fee for handling the sale of real estate is considered a real estate commission, even if the compensation is labeled a "finder's fee"). Accordingly, we sustain appellant's first issue.

II. Is Jacobson entitled to sue for brokerage fees when he is not a licensed broker and the agreement is not in writing?

In their second issue, appellants assert that because Jacobson was seeking compensation for brokerage activities, he bore the burden to plead and prove he had a valid broker's license to recover these fees. Section 1101.806 of the Act provides that an individual may not maintain a cause of action to collect compensation for acting as a broker unless that individual pleads and proves that he was either a license holder at the time the act commenced or an attorney licensed in any state. Tex. Occ. Code Ann. § 1101.806(b).

Here, Jacobson admitted in his pleadings that he was not a real estate broker. Additionally, he did not allege or establish that he was a licensed attorney. Under these circumstances, we see no basis for Jacobson to recover brokerage fees in this case. *See id.*; *see also David Gavin Co. v. Gibson*, 780 S.W.2d 833, 834–35 (Tex. App.—Houston [14th Dist.] 1989, writ denied) (concluding that individual who failed to plead and prove he was a licensed real estate broker was not entitled to recover commission for transaction involving sale of realty). We thus sustain Expo and Kim's second issue.

In their related third issue, Expo and Kim contend that there is no evidence Jacobson had a valid, written agreement for brokerage fees. The Real Estate License Act provides:

> A person may not maintain an action in this state to recover a commission for the sale or purchase of real estate unless the promise or agreement on which the action is based, or a memorandum, is in writing and signed by the party against whom the action is brought or by a person authorized by that party to sign the document.

Tex. Occ. Code Ann. § 1101.806(c). Here, it is undisputed that Jacobson sought to recover on an alleged oral contract. But without a written fee agreement, even if Jacobson were a licensed broker—which he admittedly is not—he is prohibited from recovering a commission for his participation in a real estate transaction. *See id.*; *see also Swor*, 146 S.W.3d at 782–83. We thus sustain appellants' third issue.

III. Is there any other basis upon which to affirm the trial court's judgment?

A. Exceptions to the Act

Jacobson asserts that he was acting as an attorney-in-fact for Expo and Kim; thus the Act does not apply to him. As is relevant here, the Act provides that it does not apply to "an attorney-in-fact *authorized under a power of attorney* to conduct a real estate transaction[.]" *Id.* § 1101.005(2) (Vernon Supp. 2009) (emphasis added). Here, there is nothing in the record reflecting that Expo or Kim provided Jacobson with a power of attorney to conduct a real estate transaction. However, Jacobson states that he was acting under a "verbal power of attorney." Jacobson has not cited, and we have not found, any authority to suggest that a power of attorney may be verbal. Indeed, Black's Law Dictionary defines "power of attorney" as "[a]n *instrument in writing* whereby one person, as principal, appoints another as his agent and confers authority to perform certain specified acts or kinds of acts on behalf of principal." BLACK'S LAW DICTIONARY 1171 (6th ed. 1990). With absolutely nothing in the record to indicate that Jacobson was acting under a valid power of attorney to conduct a real estate transaction for appellants, we cannot affirm the judgment on this basis.

B. Quantum Meruit

As noted above, Jacobson also sued appellants under the theory of quantum meruit. Quantum meruit is an equitable remedy that is independent of an express contract. *See Vortt Exploration Co. v. Chevron U.S.A., Inc.*, 787 S.W.2d 942, 944 (Tex. 1990); *see also AKIB Constr., Inc. v. Neff Rental, Inc.*, No. 14-07-00063-CV, 2008 WL 878935, at *4 (Tex. App.—Houston [14th Dist.] Apr. 3, 2008, no pet.) (mem. op.).

Here, the Real Estate License Act provides that an individual may not recover a commission for the sale or purchase of real estate unless the commission agreement is in writing and signed by the party to be charged. Tex. Occ. Code Ann. § 1101.806(c). There is no dispute in this case that the parties do not have a signed, written agreement. The Texas Supreme Court has stated, "We have consistently refused to erode section [1101.806(c)] with the same exceptions as may render oral contracts within the general statute of frauds enforceable." *Trammel Crow Co. No. 60 v. Harkinson*, 944 S.W.2d 631, 636 (Tex. 1997) (discussing prior version of Act). The Court went on to explain that "to permit recovery of a commission on a theory of quantum meruit would in effect render the statute requiring a written commission agreement a nullity." *Id.* (citing *Landis v. W.H. Fuqua, Inc.*, 159 S.W.2d 228, 230–31 (Tex. Civ. App.—Amarillo 1942, writ ref'd)). Thus, this theory of recovery provides no basis to affirm the trial court's judgment. *See id.*; *see also Swor*, 146 S.W.3d at 783 ("[I]f there is no signed written agreement . . . public policy as expressed in [the Act] preclude[s] any action to recover a commission, whether in tort or in contract.").

Conclusion

In sum, the provisions of the Real Estate License Act prohibit Jacobson from recovering any fee for his services. It is undisputed that no written agreement existed in this case and that Jacobson was not a licensed real estate broker or salesperson at the time the alleged cause of action arose. Accordingly, we have sustained appellants' first, second, and third issues. We therefore reverse the trial court's judgment and render a take-nothing judgment in favor of Expo and Kim.

/s/ John S. Anderson
Justice

Panel consists of Chief Justice Hedges and Justices Anderson and Christopher.