In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-15-00014-CV

BURTON CREEK DEVELOPMENT, LTD. AND
BURTON CREEK MANAGEMENT, LLC, APPELLANTS

V.

DAVID COTTRELL, APPELLEE

On Appeal from the 272nd District Court
Brazos County, Texas
Trial Court No. 13-00062-CV-272; Honorable Travis Bryan III, Presiding

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December 14, 2016

MEMORANDUM OPINION

Before QUINN, C.J., and CAMPBELL and PIRTLE, JJ.

In this action to recover a real estate brokerage commission, the trial court granted summary judgment in favor of the plaintiff and Appellee herein, David Cottrell, a Texas licensed real estate broker.[1] At the same time, the trial court denied the

[1] Evidence showed that Cottrell has been continuously licensed by the Texas Real Estate Commission since 1973.

summary judgment motion of the defendants and Appellants herein, Burton Creek Development, Ltd. and Burton Creek Management, LLC (hereinafter collectively "Burton Creek"), based on the affirmative defense of violation of the statute of frauds provision of the Texas Real Estate Licensing Act (RELA).[2] As a result, the court entered judgment in favor of Cottrell and against Burton Creek for the recovery of a real estate commission of $50,015.15, plus attorney's fees through trial in the sum of $23,150. By two issues, Burton Creek asserts the trial court erred when it (1) denied its motion for summary judgment and (2) granted Cottrell's motion for summary judgment. We affirm the judgment of the trial court.

BACKGROUND

In 2010, Burton Creek owned a subdivision development in Brazos County, Texas, known as Briar Meadows Creek Subdivision, Phase III. The Subdivision consisted of 4 tracts identified as Lots 1, 2, 3, and 4. Lot 1 was bounded on the north by East Williams J. Bryan Parkway, on the east and south by Nash Street, and partially on the west by Villa Maria Road.

Burton Creek placed a sign on Lot 1 which provided that a "[s]hopping center was coming soon." The sign advised interested parties to call Cottrell's office number. In his affidavit, Cottrell avers that, at the time, Burton Creek's plan was to develop the northeast corner of Lot 1 as a retail strip center, with the remaining nine to ten acres to be developed as apartments. The sign was located more than two hundred feet from what Cottrell described as the northeast corner of Lot 1. Without a formal written

[2] *See* TEX. OCC. CODE ANN. §§ 1101.001-.806 (West 2012 and West Supp. 2016).

broker's agreement, Cottrell began looking for entities interested in purchasing all or part of Lot 1.

In late 2010, Cottrell began working with representatives of CVS Pharmacy concerning the purchase of a partial tract of land out of Lot 1. Cottrell introduced the potential purchasers to Paul J. Leventis, Burton Creek's Chief Operating Officer. Although discussions between CVS and Burton Creek progressed to the point that CVS submitted a proposed site plan, the two entities never reached an agreement for the sale and purchase of that property.

Subsequently, on December 14, 2011, Leventis sent Cottrell the following email on behalf of Burton Creek:[3]

> David,
>
> Per our conversation yesterday, Burton Creek Development will pay you a %6 commission for any buyer that you bring to the table who closes on our property located at WJ Bryan, Villa Maria and Nash. Please note, we have a group who is willing to buy our apartment land at $7/sf, therefore, the amount for your buyer would need to be $7.45/sf to cover your 6% commission.
>
> We can talk about the other tracts and pricing when we meet later this week.
>
> Thanks,
> Paul

[3] In his deposition, Cottrell testified this email is the only document on which he relies to establish a commission contract between him and Burton Creek. He further testified the email refers to the entire development, not a smaller tract out of the northeast corner of Lot 1. He testified that the email described the property bounded by the William J. Bryan Parkway, Villa Maria Road, and Nash Street—Lot 1. The northeast corner of Lot 1 is bounded by William J. Bryan Parkway and Nash Street but not Villa Maria Road. He acknowledged the email did not contain a specific reference to a smaller tract located in the northeast corner of Lot 1.

Later that same day, Leventis sent Cottrell a second email, as part of the same email chain, which provided as follows:

> David,
>
> As a clarification, the 6% commission will cover your commission of %3 and a %3 commission to the buyer agent that is bringing the group out of Dallas. Please confirm that this is correct so there is no misunderstanding.
>
> Thanks,
> Paul

Three months later, in March 2012, Burton Creek began negotiating with Stripes, a business entity that developed retail space for gasoline station/convenience stores. Leventis sent Cottrell an email depicting a site plan for an apartment deal and a layout for Stripes. The Stripes layout was a small square area out of the northeast corner of Lot 1. Despite these negotiations, Burton Creek and Stripes never consummated an agreement for the sale and purchase of that property.

Later that same month, Cottrell was contacted by Kate Neyhart, a representative of RaceTrac Petroleum. Neyhart indicated to Cottrell that RaceTrac might be interested in developing the northeast corner of Lot 1 as a gasoline station/convenience store. Cottrell introduced Neyhart to Leventis. In April, Leventis sent Cottrell an email stating "[h]ere is the site plan that shows the location behind the corner where racetrack [sic] is looking. I will see you and the Coffee Shop guy at 10:00 a.m. this morning."[4] During the course of their negotiations, Leventis sent Cottrell an email consisting of a drawing depicting how Lot 1 might be developed to accommodate RaceTrac. Cottrell sent the

[4] The "Coffee Shop guy" was another potential buyer located by Cottrell who was interested in purchasing a smaller partial tract out of Lot 1.

drawing to RaceTrac's representative and advised her of the approximate size and dimensions of the tract and its sales price. During this period of time, Lesleigh Batchelor replaced Neyhart as RaceTrac's representative. Cottrell contacted Batchelor and arranged a visit to the site, and thereafter, Cottrell and Batchelor met with Leventis at his office.

During these negotiations, Cottrell was copied on nearly all emails exchanged between Leventis and Batchelor, including a draft of the first contract for the sale and purchase of a partial tract of land out of Lot 1. Cottrell was also copied on an email indicating RaceTrac would be making an offer on the property if proper approvals were attained. Four days later, Cottrell was copied on an email wherein Batchelor advised Leventis that she had signed a proposed contract and wanted to meet. At the same time, Batchelor sent Cottrell a copy of that contract. Cottrell attended a subsequent meeting between Leventis and Batchelor; however, no final contract was executed at that time.

Thereafter, RaceTrac and Burton Creek continued to negotiate for a substantial period of time without Cottrell's input. A final contract of sale was negotiated and closed without Cottrell's input or assistance when, in January 2013, Burton Creek sold a portion of Lot 1 to Gingercrest, Inc., an entity related to RaceTrac, for $850,252.50. Thereafter, Cottrell made a demand on Burton Creek that they pay a commission equaling six percent of the sales price. When Burton Creek did not respond, Cottrell filed this lawsuit seeking recovery of the real estate commission he believed Burton Creek owed.

In his *Third Amended Original Petition*, Cottrell asserted an action for breach of contract, seeking recovery of a real estate commission of $51,015.15 and attorney's fees. Burton Creek filed a general denial and raised the affirmative defense of statute of frauds. Both parties filed traditional motions for summary judgment, and on June 26, 2014, the trial court entered a *Partial Summary Judgment* denying Burton Creek's motion for summary judgment and granting Cottrell's cross-motion for summary judgment for actual damages in the principal amount of $50,015.15.[5] On November 17, 2014, after a bench trial on the issue of attorney's fees, the trial court entered a *Final Judgment* awarding Cottrell $50,015.15 in actual damages, prejudgment interest at the rate of six percent per annum from January 29, 2013, attorney's fees of $23,150, and contingent attorney's fees in the event of an appeal. This appeal followed.[6]

The issue on appeal is whether the email chain of December 14, 2011, satisfies the requirements of the statute of frauds provisions of RELA. More specifically, Burton Creek maintains that the series of emails does not itself, or by reference to some other writing, identify with reasonable certainty the property, the sale of which would trigger an obligation to pay Cottrell a real estate commission.

[5] Six percent of $850,252.50 is $51,015.15, the amount claimed by Cottrell in his *Third Amended Original Petition.* For reasons unexplained, in his *Cross-Motion for Summary Judgment,* Cottrell claimed that six percent of the sales price was $50,015.15, the amount ultimately awarded by the trial court. Cottrell does not appeal this apparent discrepancy.

[6] Originally appealed to the Tenth Court of Appeals in Waco, this appeal was transferred to this court by the Texas Supreme Court pursuant to its docket equalization efforts. TEX. GOV'T CODE ANN. § 73.001 (West 2013). We are unaware of any conflict between precedent of the Tenth Court of Appeals and that of this court on any relevant issue. TEX. R. APP. P. 41.3.

STANDARD OF REVIEW

The standard of review for a traditional summary judgment is well known. *See Nixon v. Mr. Prop. Mgmt. Co*., 690 S.W.2d 546, 548-49 (Tex. 1985). Generally stated, we review summary judgment proceedings under a *de novo* standard of review. *Travelers Inc. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010). Under that standard, we review the evidence presented in the motion and response in the light most favorable to the party against whom the summary judgment was rendered, crediting evidence favorable to that party if reasonable minds could, and disregarding contrary evidence unless reasonable minds could not. *See City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). In a traditional motion for summary judgment, the movant has the burden of showing that no genuine issue of material fact exists and that he is entitled to a summary judgment as a matter of law. TEX. R. CIV. P. 166a(c). *See Steptoe v. JPMorgan Chase Bank, N.A.*, 464 S.W.3d 429, 431 (Tex. App.—Houston [1st Dist.] 2015, no pet.) (citing *Am. Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 425 (Tex. 1997)).

When both parties move for summary judgment, each party bears the burden of establishing that it is entitled to judgment as a matter of law. *City of Garland v. Dallas Morning News,* 22 S.W.3d 351, 356 (Tex. 2000). When the trial court grants one motion and denies the other, as here, the reviewing court considers the summary judgment evidence presented by both sides, determines all questions presented, and if the reviewing court determines that the trial court erred, renders the judgment the trial court should have rendered. *Canyon Reg'l Water Auth. v. Guadalupe-Blanco River Auth.*, 258 S.W.3d 613, 616 (Tex. 2008) (citing *Texas Workers' Comp. Comm'n v. Patient Advocates of Texas,* 136 S.W.3d 643, 648 (Tex. 2004)).

STATUTE OF FRAUDS

The statute of frauds applicable to an agreement to pay a real estate brokerage commission is set forth in section 1101.806(c) of the Texas Occupations Code. That provision states as follows:

> [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) (West Supp. 2016).

Texas courts have interpreted this provision as requiring (1) a written agreement or memorandum, (2) signed by the person to be charged with the commission, (3) containing a promise to pay a definite commission, (4) naming the broker to whom the commission is to be paid, and (5) either by itself or by reference to some existing writing, identify with reasonable certainty the property to be conveyed. *Lathem v. Kruse*, 290 S.W.3d 922, 925 (Tex. App.—Dallas 2009, no pet.). The party pleading statute of frauds bears the initial burden of establishing its applicability. TEX. R. CIV. P. 94; *Dynegy, Inc. v. Yates,* 422 S.W.3d 638, 641 (Tex. 2013). Once a party has met the initial burden of invoking the statute, the burden shifts to the opposing party to establish an exception that would take the agreement out of the statute of frauds. *Id.*

Partial performance is a well-recognized exception to the statute of frauds. *Carmack v. Beltway Dev. Co.*, 701 S.W.2d 37, 40 (Tex. App.—Dallas 1985, no writ). Under this exception, contracts that have been partially performed, but do not otherwise meet the requirements of the statute of frauds, may still be enforced in equity if denial of

enforcement would amount to a virtual fraud in the sense that the party acting in reliance on the contract has suffered a substantial detriment, for which he has no adequate remedy, and the other party would reap an unearned benefit. *Id.* Applying this exception, we must keep in mind the fact that the "common rationale" underlying the application of the partial performance exception is the existence of "strong evidence" providing affirmative corroboration of an agreement and its terms. *Id.* Therefore, absent sufficient corroboration, partial performance of a broker's commission agreement does not excuse compliance with the statute of frauds. *See Boyert v. Tauber*, 834 S.W.2d 60, 63 (Tex. 1992) (finding partial performance did not excuse compliance with the requirement that there be a written brokerage agreement naming the broker). It has been often stated that:

> [a]llowing a broker to recover on the ground of his performance alone would permit enforcement of any commission agreement fully performed by the broker whether or not it complies with [RELA]. This would be in direct opposition to the expressed will of the legislature and would unduly expose the public to fraudulent claims for commissions.

Carmack, 701 S.W.2d at 41.

In *Carmack*, the partial performance exception was applied to the property identification element necessary for maintaining an action for recovery of a brokerage commission. *Id.* at 41-42. There, the broker's commission agreement described the premises in question as "4,868 square feet of retail space" on "Boll Street in Dallas, Texas." The agreement further provided that the premises would be used as a restaurant and that Carmack would pay the broker a six percent commission based on the rentals provided in a lease between Carmack and a tenant procured by the broker.

The lease agreement entered into at approximately the same time described a tract of land as "a store unit of approximately 4,868 square feet, such store unit being outlined in red on the plan attached hereto as Exhibit A, being generally described as 2708-2714 Boll Street, Dallas, Texas." "Exhibit A" to the lease agreement contained an outline of a building described as an "available restaurant location" of approximately 4,868 square feet on "Boll Street." The lease agreement also acknowledged the broker's services in securing execution of the lease. Following execution of the lease, and occupancy of the property by the lessee, Carmack paid the broker approximately one-half of the total commission due as calculated from the rentals due under the primary term of the lease. Approximately a year later, after the leased retail space was destroyed by fire, Carmack terminated the lease and refused to pay the second half of the broker's commission. Under those circumstances, even though the Dallas Court of Appeals found that the property was not described with reasonable certainty sufficient to satisfy the statute of frauds, the court held that identification of the property with that degree of certainty was not required because the broker established that (1) he fully performed his obligations under the agreement, (2) Carmack knowingly accepted his services by completing the transaction arranged and receiving the benefits from that transaction, and (3) documentary evidence established the amount of the commission due. *Id.* The court found that, under those circumstances, failure to enforce the commission agreement would "perpetuate a fraud rather than prevent it." *Id.* at 41. Accordingly, the court affirmed the trial court's judgment enforcing the broker's commission agreement.

ANALYSIS

Because Burton Creek owned several tracts of land in the geographic area described by the email chain in question (to-wit: the four lots described as "our property located at WJ Bryan, Villa Maria and Nash") and it intended to develop those tracts of land for different uses (e.g., apartments, strip centers, and retail stores), it maintains Cottrell's "agreement" does not strictly comply with RELA because it does not describe the property actually sold with "reasonable certainty" sufficient to satisfy the statute of frauds. While Cottrell contends, with admirable candor, that the email chain would meet the requirements of the statute of frauds "but for the property description," he also contends he has conclusively proven his claim falls within the partial performance exception, thereby obviating the need to satisfy the requirement that the property be described with reasonable certainty.

Relevant to Burton Creek's contention, Texas courts "have long held that a contract providing for the sale or lease of an unidentified portion of a larger, identifiable tract is not sufficient" for purposes of the statute of frauds. *Tex. Builders v. Kelly,* 928 S.W.2d 479, 482 (Tex. 1996) (holding that a real estate broker could not recover a commission because the writing relied upon failed to describe the property in question with sufficient certainty to satisfy RELA). While a written agreement need not contain an exact metes and bounds description of the property in order to be enforceable, it must furnish sufficient data to identify the property with reasonable certainty. *Id.* at 481 (citing *Morrow v. Shotwell*, 477 S.W.2d 538, 539 (Tex. 1972)).

With respect to Cottrell's traditional motion for summary judgment, he had the burden to demonstrate there were no genuine issues of material fact concerning his claim for a real estate broker's commission due and that he was entitled to judgment as a matter of law. In that regard, Cottrell had the burden of proving, as a matter of law, that either (1) the email chain in question, the only writing proffered to establish his commission claim, satisfied the statute of frauds provisions of RELA or (2) conclusively establish that the partial performance doctrine applied because denial of enforcement would amount to a virtual fraud in the sense that he would suffer a substantial detriment, for which he has no adequate remedy, and Burton Creek would reap an unearned benefit. As noted above, because Cottrell candidly concedes that the writing in question (the email chain) does not identify the particular tract of property in controversy (the property sold) with sufficient certainty to satisfy the requirements of RELA's statute of frauds, we must determine whether he has established, as a matter of law, application of the partial performance exception.

Likewise, because Burton Creek sought to defeat Cottrell's claim by establishing that the email chain failed to satisfy RELA's statute of frauds, it too had the burden of demonstrating the elements of its affirmative defense as a matter of law. *See Kalmus v. Oliver*, 390 S.W.3d 586, 589 (Tex. App.—Dallas 2012, no pet.) (holding that "[t]he statute of frauds is an affirmative defense in a breach of contract suit and renders a contract that falls within its purview unenforceable"). Again, because it is undisputed that the email chain did not describe the property subject to the commission agreement with "reasonable certainty" to satisfy the statute of frauds, this case ultimately turns on the question of whether the partial performance exception applies to the facts of this

case. Concomitantly, that question turns on whether Cottrell provided sufficient affirmative corroboration as to whether there was a brokerage agreement encompassing the property actually sold.

Whether a contract comes within the statute of frauds is a question of law which we review *de novo*. *Dynergy, Inc.*, 422 S.W.3d at 642. In the course of that *de novo* review, we must be mindful that the doctrine of partial performance applies to the statute of frauds provision governing the enforcement of a broker's "action in this state to recover a commission for the sale or purchase of real estate" when the real estate broker's commission agreement fails to describe the property with reasonable certainty. *See* TEX. OCC. CODE ANN. § 1101.806(c) (West Supp. 2016); *Boyert*, 834 S.W.2d at 63-64. *See also Carmack,* 701 S.W.2d at 41-42. That being said, we must also remain mindful that allowing a broker to recover on the ground of his performance alone "would be in direct opposition to the expressed will of the legislature and would unduly expose the public to fraudulent claims or commissions." *Boyert,* 834 S.W.2d at 63-64 (quoting *Carmack*, 701 S.W.2d at 41).

When a real estate broker's commission agreement fails to adequately describe the property, the doctrine of partial performance may permit enforcement notwithstanding the statute of frauds if (1) the broker fully performed; (2) the other party has knowingly accepted the broker's services by completing the transaction arranged by the broker and receiving the benefits from the transaction; (3) the other party has acknowledged in writing his obligation for a commission; and (4) documentary evidence establishes the commission due. *Lathem*, 290 S.W.3d at 928. The "key element" under

the doctrine of partial performance is corroboration. *Boyert,* 834 S.W.2d at 63. Therefore, in order to establish application of the partial performance exception, Cottrell would have to satisfy the four elements listed above and present "affirmative corroboration" of the missing terms. *Lathem*, 290 S.W.3d at 928 (citing *Boyert*, 834 S.W.2d at 63-64). Absent that corroboration, partial performance of a brokerage agreement does not excuse compliance with the statute of frauds requirements. *See Boyert*, 834 S.W.2d at 63. (citing *Landis v. W. H. Fuqua, Inc.,* 159 S.W.2d 228, 231 (Tex. Civ. App.—Amarillo 1942, writ ref'd)).

Here, Cottrell's summary judgment evidence is extensive. First, it includes the email chain Cottrell proffers as the basis of his commission claim, which states: "Burton Creek Development will pay you a %6 [sic] commission for any buyer that you bring to the table who closes on our property located at WJ Bryan, Villa Maria and Nash." As such, the email satisfies four of the five elements Texas courts have interpreted RELA's statute of frauds to require: (1) a written agreement or memorandum, (2) signed by the person to be charged with the commission, (3) containing a promise to pay a definite commission, (4) naming the broker to whom the commission is to be paid; and it is lacking only in the final requirement that the writing, either by itself or by reference to some existing writing, identify with reasonable certainty the property conveyed. *Lathem*, 290 S.W.3d at 925.

In an attempt to meet his burden, Cottrell proffered excerpts from the deposition of Leventis establishing the execution of a warranty deed from Burton Creek Development, Ltd. to Gingercrest, Inc. for the sale of a specifically described tract of

land out of Lot 1 of the Briar Meadows Creek Subdivision, Phase III.[7] The summary judgment evidence included a certified copy of that warranty deed and a review of the summary judgment evidence establishes that the property described is, in fact, a smaller tract of land out of Burton Creek's property located at "WJ Bryan, Villa Maria and Nash" roads. Accordingly, Cottrell provided sufficient "affirmative corroboration" of the missing terms necessary to establish that he was entitled to a commission on the sale of that property.

The summary judgment evidence establishes the applicability of the partial performance exception to RELA's statute of frauds. First, the email chain of December 14 constituted documentary evidence wherein Burton Creek acknowledged its obligation to pay a "%6 commission" upon closure of a sale involving "our" property, which was shown to be the four lots located in the Briar Meadows Creek Subdivision, Phase III. Secondly, Burton Creek implicitly agreed to pay a commission on a partial tract out of that larger tract when it sent Cottrell the December 14 email after negotiating with CVS Pharmacy, through Cottrell, on the sale and purchase of a partial tract of land out of Lot 1. Burton Creek further implied that it would pay a commission on the sale of a partial tract when it distinguished "our apartment land" from "other tracts" and when it negotiated with Stripes, again through Cottrell, on the sale and purchase of a partial tract. Thirdly, Cottrell established that he introduced Burton Creek to representatives of RaceTrac and he showed the property in question to those representatives. During the

[7] The warranty deed described the property being sold as "[a] tract or parcel, containing 1.7350 acres or 75,578 square feet of land, being a portion of a called 26.08 acre tract of land to Burton Creek Development . . . and a portion of a called 21.21 acre tract of land to the United States Postal Service . . . and a portion of Lot 1 of Burton Meadows Creek Subdivision, Phase III . . . situated in the John Austin Survey, Abstract No. 2, Brazos County, Texas, said 1.7350 acres being described as follows . . . [detailed metes and bounds description].

initial negotiation period, he was included in many of the emails between Burton Creek and RaceTrac. Cottrell sent drawings of a proposed tract to RaceTrac's representatives and he advised them of the approximate size and dimensions of the tract and its sales price. He was provided a copy of a proposed contract between Burton Creek and RaceTrac, he attended meetings between the parties, and he served as a go-between until they began direct negotiations. Cottrell "brought [RaceTrac] to the table" and his introduction ultimately lead to the purchase of the property at issue by Gingercrest, Inc., an entity related to RaceTrac. Additionally, the summary judgment evidence establishes that Burton Creek knowingly accepted Cottrell's services by negotiating with RaceTrac representatives and by closing on a contract of sale for a negotiated price of $850,252.50. Considering the summary judgment evidence as a whole, Cottrell provided sufficient documentary evidence that he facilitated the sale of a specific piece of property, covered by a commission agreement, for a specific amount of consideration, upon which a commission was due and could be calculated.

Based upon these considerations, we find the trial court did not err in finding that the doctrine of partial performance applied to the facts of this case. The inadequacy of the property description of the tract actually sold should not, in equity, defeat Cottrell's right to a commission where the evidence established that (1) Cottrell fully performed his obligations under the agreement, (2) Burton Creek knowingly accepted his services by completing the transaction arranged and receiving the benefits from that transaction, and (3) documentary evidence established the amount of the commission due. *See Carmack*, 701 S.W.2d at 41-42. Under these limited circumstances, we hold that application of the statute of frauds would work an injustice rather than prevent it

because enforcement of the statute would cause Cottrell, the party acting in reliance of the real estate broker's commission agreement, to suffer a substantial detriment, for which he has no adequate remedy, and Burton Creek to reap an unearned benefit. *Carmack*, 701 S.W.2d at 40.

CONCLUSION

For the reasons stated, we overrule Burton Creek's issues and affirm the judgment of the trial court.

Patrick A. Pirtle
Justice