Lang McLaughry Spera Real Estate, LLC v. Hinsdale, No. S0570-08 CnC (Toor, J., Dec. 23, 2009)

STATE OF VERMONT
CHITTENDEN COUNTY, SS

LANG MCLAUGHRY SPERA REAL ESTATE, LLC, Plaintiff v. CLARK W. HINSDALE, III and SUZANNE G. HINSDALE Defendant	SUPERIOR COURT Docket No. S0570-08 CnC

RULING ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

This case concerns the marketing and sale of real estate, business, and equipment owned by Defendants, Clark and Suzanne Hinsdale ("the Hinsdales"), by Plaintiff, Lang McLaughry Spera Real Estate ("Lang"). Lang brought this suit for attorney's fees and collection of $9,000, which Lang alleges is the remaining commission owed by the Hinsdales for the sale of their property. The Hinsdales deny that they owe $9,000 and filed counterclaims alleging a violation of the Vermont Real Estate Commission Rules, breach of contract, and consumer fraud. They are seeking a refund of the $45,000 commission paid to Lang, attorney's fees, interest and other costs of the action. Lang moves for summary judgment on its claims for $9,000 and attorney's fees and on the Hinsdales' counterclaims. The Hinsdales move for partial summary judgment, seeking

judgment against Lang on its claims for collections and attorney's fees, and oppose summary judgment in favor of Lang on the Hinsdales' counterclaims.

Undisputed Facts

The Hinsdales owned the Charlotte Berry Farm ("the Farm"), which consists of 56 acres, a two family residence, and berry fields. In 2007, they listed the property with Lang because one of their friends, Kathy Hale, was a real estate agent at that firm. Lang's analysis showed that the best way to market the property was as a "country estate." Although the Hinsdales expressed their hope that the buyer would continue the berry farm business, this was not a condition of sale. Lang used a standard form from the Vermont Association of Realtors to prepare the Exclusive Right to Market Property Agreement ("Listing Agreement"), which included the address of the real estate but no further description. Lang also prepared two information sheets to present the property to the Multiple Listing Service ("MLS"), which contained a more detailed description of the property and were executed contemporaneously with the Listing Agreement. The Listing Agreement stated that the Hinsdales would pay a 6% commission on the sales price for Lang's services. The sales price on the Listing Agreement is $1,250,000. The MLS information forms stated that the buyer-agent commission would be 3%, but Lang later changed this figure to 2.5%, and the property was ultimately listed on the MLS showing that a broker bringing a buyer for the property would receive a 2.5% commission. Neither the Listing Agreement nor the MLS information sheets stated that any equipment was a part of the property, but the MLS forms describe the property as a berry farm with various outbuildings and business opportunities.

Lang asked the Hinsdales what equipment might be included in the transaction. The Hinsdales stated that it was negotiable, but indicated that supplies specific to the berry farm would stay. The Hinsdales also provided Lang with some financial information about the business, and Lang used the information about the business and equipment to sell the property. In addition, Lang prepared brochures marketing the Charlotte Berry Farm. The brochures explain that the Farm includes a farm stand and store, farm outbuildings, a two family log home, and approximately 56 acres. One brochure notes that there are opportunities for expansion and states that the business' financial information is available to qualified buyers. Another brochure explains that the log home is currently used as a duplex and can house farm workers, though the current tenants would love to stay at their current $1,000 per month rent.

Lang showed the property to Bradley and Polly Simpkins ("the Simpkins"), who made an offer of $900,000. A Purchase and Sale Contract ("P&S") was executed on November 23, 2007, along with a general addendum ("November Addendum") that stated, among other things, that the equipment in the farm stand and the equipment in an attached list would transfer with the real property. On November 15, 2007, the Hinsdales wrote the Simpkins to explain that assigning value to the real estate, business, and equipment would prevent the Simpkins from paying a transfer tax or property tax on some of the total purchase price. On December 20, 2007, the Simpkins and Hinsdales executed another addendum ("December Addendum"), which allocated the purchase price between the real property, business, and equipment as $725,000, $100,000 and $75,000 respectively.

At closing, Lang presented a commission statement requesting payment of $45,000, which was based on a 5% commission of the $900,000 price. The Hinsdales paid the $45,000. After closing, Lang realized that the calculation of commission at 5% was a clerical error, since the commission was listed in the contract at 6%. Lang explained the error and requested the additional $9,000 commission from the Hinsdales after closing. The Hinsdales, however, argued that they only owed a 6% commission on the $725,000 sales price of the real property, for a total of $43,500.

After receiving Lang's request for the additional $9,000, the Hinsdales requested that both parties participate in mediation. The parties dispute why this avenue was not pursued, but ultimately no mediation was ever scheduled and Lang brought this action to recover the $9,000 of commission and attorneys fees. The Hinsdales counterclaimed alleging a violation of the Vermont Real Estate Commission Rules, breach of contract, and consumer fraud.

Conclusions of Law

1. The Commission

The parties essentially dispute the meaning of the term "sale price" in the Listing Agreement. Both parties first argue that that there is no ambiguity. Lang argues that the term "sale price" refers to the total $900,000 listed on the P&S, while the Hinsdales claim that the "sale price" only refers to the $725,000 allotted to the real property in the December Addendum to the P&S.

The "cardinal rule" in interpreting contracts is that the intent of the parties governs. Four Oaks Conservation Trust v. Bianco, 2006 VT 6, ¶ 5, 179 Vt. 597, 598. This court first looks "to the language of the written instrument because it is assumed to

declare the intent of the parties." Kipp v. Chips Estate, 169 Vt. 102, 105 (1999). Here, the Listing Agreement is a form from the Vermont Association of Realtors and serves as the contract between the two parties. The Listing Agreement has a space for the property address, which is listed as [address redacted], but does not have a space for a description of the property. The price is listed as $1,250,000. Finally, the Listing Agreement states that the Hinsdales agree to pay Lang 6% of the sale price for its services.

The P&S contract between the Simpkins and the Hinsdales states that the total purchase price is $900,000 and describes the real property as "Charlotte Berry Farm." In paragraph 31, the P&S also states that Lang and the buyer's agent brought about the contract. In addition, the November Addendum provides that all equipment in the farm stand and the identified items in an attached equipment list constitute personal property to be transferred with the real property and that these items are not considered to have any monetary value. Finally, the December Addendum drafted by the Hinsdales' attorney states that the purchase price of the real estate is $725,000, the purchase price of the business known as the Berry Farm and Farm Stand is $100,000, and the purchase price of the equipment is more or less $75,000.

The plain language of these documents states that the Hinsdales agreed to pay a 6% commission on the sales price for Lang's services, that Lang sold the Charlotte Berry Farm, and that the final purchase price was $900,000. This points to a 6% commission on a $900,000 sale. Nevertheless, "'plain meaning' cannot exist in a vacuum," and the Vermont Supreme Court held that "when inquiring into the existence of ambiguity," a court may "consider the circumstances surrounding the making of the agreement." Isbrandtsen v. N. Branch Corp., 150 Vt. 575, 579 (1988). In Isbrandtsen, the Court stated

that "[t]he question of whether a contract term is ambiguous is a matter of law for the court to decide." Id. at 577. Because the parties have varying interpretations of the documents, and because Lang refers to ambiguity in its argument, this court will consider the surrounding circumstances to determine whether an ambiguity exists.

The surrounding circumstances indicate that Lang used its expertise to sell the Charlotte Berry Farm, including the real estate, business, and equipment, and that this was the intent of the parties from the outset. The sale price initially listed on the Listing Agreement was $1,250,000. In light of the December Addendum, in which the Hinsdales only assigned the real property a value of $725,000, it seems that they included more than the value of the real property in determining the price on the Listing Agreement. Lang and the Hinsdales also executed two information sheets for submission to MLS at the same time that the Listing Agreement was signed. These forms stated that the property was the Charlotte Berry Farm, including all of the outbuildings and farm stand. The brochures marketing the Charlotte Berry Farm further emphasized the business aspects of the property.

While promoting the property, the Hinsdales provided Lang with information on business receipts and labor costs. The Hinsdales also communicated with Lang about whether or not equipment would be sold with the property. All of this information was used by Lang to secure a buyer. As for the assignment of value to the real estate, business, and equipment in the December Addendum, the Hinsdales indicated this was for tax purposes. There was no indication from the Hinsdales that they intended that the sale price meant anything other than the purchase price listed in the P&S, or that the assignment of value was for commission purposes.

Ambiguity exists "where a writing in and of itself supports a different interpretation from that which appears when it is read in light of the surrounding circumstances, and both interpretations are reasonable." Isbrandtsen, 150 Vt. at 579. The circumstances surrounding the execution of the Listing Agreement and P&S do not support an interpretation that the sale price only included the $725,000 assigned to the real property. In fact, the surrounding circumstances affirm the plain written language. Given the marketing of the property as the Charlotte Berry Farm and the discussions surrounding the ultimate sale of the property as the Farm, the only reasonable interpretation of the language in the written documents is that the sale price is the $900,000 figure listed in the P&S.

Under the terms of the Listing Agreement, the Hinsdales were obligated to pay a commission equaling 6% of the sale price of $900,000, for a total of $54,000 commission. It is undisputed that the Hinsdales only paid $45,000 to Lang, leaving a balance of $9,000 owed. The Hinsdales have not raised an issue of material fact for trial on this issue, and Lang's Motion for Summary Judgment on this claim is therefore granted.

2. Real Estate Commission Rules

Lang also moves for summary judgment on the Hinsdales' counterclaim alleging that Lang violated the Rules of the Vermont Real Estate Commission ("the Rules"). The Hinsdales argue that there is no written agreement covering the business or the equipment in violation of Rule 4.12(c), which states that "[a] brokerage firm may only receive the compensation provided in . . . a written agreement signed by the firm and its client" and "shall not collect any compensation for brokerage service except as

provided by this rule." The Hinsdales also claim that Lang did not include a clear description of the property in its Listing Agreement in violation of Rule 4.8.

The Hinsdales first argue that the lack of a written agreement identifying the business and equipment entitles them to a refund of the $45,000 commission paid to Lang. The Hinsdales cite Green Mountain Realty, Inc. v. Fish, in which the Vermont Supreme Court held that the real estate broker could not recover any commission because there was no written listing agreement in violation of the Rules. 133 Vt. 296 (1975). The Hinsdales do not clarify how the Rules, which govern real estate transactions, can be interpreted to apply to and require written agreements concerning the sale of business and equipment as a part of a real estate transaction. Even if the Rules were applicable to such written agreements, however, Fish is distinguishable. In Fish there was no written agreement for the property whatsoever and "a total deficiency" in meeting the requirements mandated under the Rules. Id. at 299. Here, on the other hand, there is a written Listing Agreement that is actually a form agreement from the Vermont Association of Realtors. Although the business and equipment are not mentioned specifically, the Listing Agreement disseminated by the Vermont Association of Realtors does not undermine the purpose of the Rules "to establish fair dealings between parties, standardize the procedure and practices in the real estate business and to prevent fraud." Id.

The Hinsdales also assert that Lang violated the Rules by not including a clear description of the property, as required by Rule 4.8(a)(2). Although there is no Vermont case interpreting the meaning of "clear description," the Vermont Supreme Court held that "[n]o statute requires that the violation of the regulation defeat plaintiff's right to

commission." MacDonald v. Roderick, 158 Vt. 1, 6 (1992). MacDonald involved several claims of rule violations, including the failure to identify the type of listing agreement and to set a specific expiration date. The court held that "a violation of the rules of the Real Estate Commission with respect to the form or content of a listing agreement will bar recovery of a commission only if the violation somehow taints the agreement or makes its enforcement unfair." Id. at 7. Despite the Hinsdales' allegations of confusion, the Listing Agreement made it clear that a 6% commission would be paid on the sale price, initially set at $1,250,000 on the Listing Agreement. The marketing of their property and the discussions between the parties regarding the Hinsdales' business and equipment also demonstrated that Lang was selling the property as a working farm. Ultimately, Lang did procure the sale of the property as a whole, and even if the description of the property does not meet the requirements of the Rule, that technical violation does not make it unfair for Lang to collect commission on that sale.

3. Consumer Fraud Claims

The Consumer Fraud Act ("the Act") states that "[a]ny consumer who contracts for goods or services in reliance upon false or fraudulent representations or practices prohibited by section 2453" or "who sustains damages or injury as a result of any false or fraudulent representations or practices prohibited by section 2453" may sue for damages, reasonable attorney's fees, and exemplary damages. 9 V.S.A. § 2461. Section 2453 makes unlawful "[u]nfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce." 9 V.S.A. § 2453(a). There are three requirements to establish an unfair or deceptive act or practice: "(1) there must be a representation, practice, or omission likely to mislead the consumer; (2) the consumer must be

interpreting the message reasonably under the circumstances; and (3) the misleading effects must be 'material,' that is, likely to affect the consumer's conduct or decision with regard to a product." Greene v. Stevens Gas Service, 2004 VT 67, ¶ 15, 177 Vt. 90, 97 (quoting Peabody v. P.J.'s Auto Village, Inc., 153 Vt. 55, 57 (1989)) (internal quotations omitted).

This court addresses each of the consumer fraud claims in turn. First, the Hinsdales allege that the lack of a clear description of the property at issue in the Listing Agreement constitutes consumer fraud. The Hinsdales do not satisfy the first and second prongs of the three part test, however. The 6% commission on the "sale price" of the property, which was marketed as a working farm, was not likely to mislead the consumer in light of the written Listing Agreement and circumstances surrounding the marketing and sale of the property. For those same reasons, the Hinsdales' interpretation that they would only pay commission on the sale price for the real property, which at the time of the listing agreement had not been discussed, was not reasonable. In fact, the Listing Agreement lists the price of the property as $1,250,000. The Hinsdales could not reasonably have interpreted that this number only included the real property, ultimately assessed at $750,000.

Second, the Hinsdales allege that the paragraph in the Listing Agreement regarding mediation was deceptive and misleading, constituting consumer fraud. The Listing Agreement stated, "Listing Agency recommends the use of a dispute resolution system that utilizes mediation as an alternative to litigation in the event of any dispute or claim arising out of or relating to this Agreement." This recommendation is not likely to

mislead a consumer into believing that mediation is guaranteed. The Hinsdales' interpretation that they had any right to mediation is unreasonable.

Third, the Hinsdales argue that Lang has a policy of claiming commission on personal property not included in the listing agreement and that this constitutes consumer fraud. Although there are disputed facts surrounding whether Lang has such a policy, the Hinsdales do not state their basis for this consumer fraud claim. As stated above, a person can sue if he or she entered into a contract in reliance upon fraudulent misrepresentations or suffered damages or injury as a result of fraudulent misrepresentations. Even if Lang has such a policy, for the reasons discussed above, there was no fraudulent misrepresentation with the commission claimed on the Farm in this case.

Fourth, the Hinsdales assert that Lang has a policy of refusing to negotiate a legitimate dispute, thereby committing consumer fraud. Specifically, the Hinsdales argue that Lang refuses to negotiate on the commission or mediate over money. Again, this is essentially the same claim that the Hinsdales made regarding Lang's failure to mediate in their case, but extending the claim to encompass a corporate policy. Because this court has already discussed why the Hinsdales' claim of failure to mediate cannot satisfy the three part consumer fraud test required to survive summary judgment, this claim of an alleged policy of refusing to mediate fares no better. The test is still applied to the Hinsdales' specific case and contract, which does not constitute consumer fraud.

Fifth, the Hinsdales allege that Lang committed consumer fraud by stating that Ms. Hale, the individual real estate broker and friend of the Hinsdales, would receive a reduction in her commission if the Hinsdales did not pay the additional $9,000

commission. There are disputes as to exactly what Lang told the Hinsdales, but the Hinsdales do not claim that they either entered into the contract with Lang on reliance upon this alleged fraudulent representation or that they suffered damages as a result of it. In fact, this alleged statement occurred after the closing and did not induce the Hinsdales to pay the additional commission. Therefore, the Hinsdales have not articulated a basis to sue on this claim under the Consumer Fraud Act. 9 V.S.A. § 2461.

Sixth, the Hinsdales argue that Lang misrepresented how the commission would be split between Lang and the buyer's agent. The Hinsdales claim that Lang said its commission would be split 50-50 with the buyer's agent, yet the commission ultimately listed with MLS and paid to the buyer's broker was only 2.5% instead of 3%. However, the Listing Agreement unambiguously states that the allocation of commissions is within Lang's sole discretion. When asked to interpret the meaning of "sole discretion," Mr. Hinsdale stated in his deposition that "[i]t means that they [Lang] had the right to do whatever they wanted . . . ." C. Hinsdale Dep. 87:8–12, March 27, 2009. Therefore, even if Lang said that they intended to split the commission 50-50, such a representation was not likely to mislead. In light of the contract, it was unreasonable for the Hinsdales to presume that Lang would not exercise its right to change or otherwise determine its allocation of commission as appropriate.

4. Attorney's Fees

Lang also moves for summary judgment on its claim for attorney's fees. The Listing Agreement provides that in the event of litigation between Lang and the Hinsdales, the prevailing party will be entitled to costs and expenses of the litigation and reasonable attorney's fees. "Attorney's fees may be awarded . . . when provided for by

statute or in a contract between the parties." Harsch Properties, Inc. v. Nicholas, 2007 VT 70, ¶ 11, 182 Vt. 196, 201 (citing Fletcher Hill, Inc. v. Crosbie, 2005 VT 1, ¶ 5, 178 Vt. 77, 79). Lang has prevailed on its claim to collect the remaining $9,000 commission and on all of the Hinsdales' counterclaims. Therefore, Lang is entitled to costs and reasonable attorney's fees under the contract.

Order

Lang's Motion for Summary Judgment on its claims for collection and attorney's fees and on the Hinsdales' counterclaims is granted.

Dated at Burlington, Vermont this __ day of December 2009.

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Helen M. Toor
Superior Court Judge